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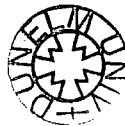
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“Moral Agency and the Minimum Conditions for Criminal
Responsibility - a Critical Examination (with particular reference
to Mental Condition Defences)”

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Master of Jurisprudence

2002



31 MAY 2002

ABSTRACT

This thesis is concerned with the minimum conditions that must be satisfied to warrant the stigma and consequences of a criminal conviction. First the conduct element of criminal liability is examined and the need for voluntary agency advocated. Attention then turns to minimum capacities for moral reasoning and evaluation required to be morally and legally answerable for one's conduct in the sense that one may be subjected to a criminal trial. Consideration is given to what may be considered justifiable measures in respect of persons who lack minimum capacities for moral reasoning and evaluation sufficient to stand trial but whose conduct is dangerous to others. Finally an examination is made of the insanity defence, the principal mechanism for determining at trial whether a person is sufficiently rational to answer for his conduct. The defence of diminished responsibility is also considered, because of its close link in practical terms with the insanity defence.

The law is stated as at 31st October 2001.

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s4(5)

Criminal Procedure (Insanity) Act 1964

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s3

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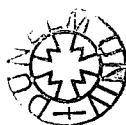
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INTRODUCTION

This thesis examines the minimum legal and moral conditions of an individual's agency and personhood in order for him to be held criminally responsible for his conduct. In the first part of Chapter One, attention is given to need for the defendant's conduct to be voluntary. Subsequently, consideration is given to the act requirement in criminal law, and to the position of state of affairs offences within this doctrine. Crimes of possession and addiction are examined and the possibility of criminal liability for thoughts is considered. The influence of the Human Rights Act 1998 in this area of law is also discussed.

In the second part of Chapter One, the need for moral agency in respect of *mala in se* crimes is recognised, and examination is given to the minimum capacities for moral reasoning and evaluation required for an individual to be regarded as a moral agent. The two competing perspectives of the choice and character theories of excuse are addressed and consideration is given to which categories of individuals may not be regarded as moral agents. It is suggested that the only true categories in this respect are of infants below the age of ten and those individuals found unfit to plead, however extension of these categories could be made in order to include the severely and permanently mentally ill. The severely personality disordered are also considered in this context, as are the socially deprived and are found to be capable of moral agency, the choice theory of excuse being favoured.



In Chapter Two, consideration is given to what may be considered justifiable measures in respect of dangerous severely personality disordered individuals, who have not offended or who require detention beyond the level of their culpability; and persons who ought not to be considered moral agents, who may not therefore be liable to account for their actions at trial, but whose conduct is dangerous to others. The existing measures for preventative detention within the criminal law are examined, as are the proposals for the reform of mental health legislation and for the introduction of legislation specifically relating to dangerous severely personality disordered individuals. Discussion is made with regard to the difficulties in accurately predicting dangerousness and in ensuring compliance with the Human Rights Act 1998.

The insanity defence, the principal mechanism for determining at trial whether a person is sufficiently rational to answer for his conduct, is examined in Chapter Three. First, theoretical considerations are made concerning: whether the insanity defence is a status or an excuse; the moral nature of the defence; the need for the defence to be concerned with an individual's rationality; and the extent to which compulsion may be included within the defence. In relation to the legal nature of the defence, discussion is made concerning whether the defence represents an absence of *mens rea*, whether there need be a causal link between the mental condition of the defendant and his act, returning again to the need for the defence to be concerned with the defendant's rationality. The *M'Naghten* Rules are examined, as are some of the procedural requirements of the defence, placed in the context of the Human Rights Act 1998. Consideration is given to the many possibilities for reform and a proposal is made.

Finally, given its close link in practical terms with the defence of insanity, in Chapter Four the defence of diminished responsibility is considered. While this defence does not recognise an absence of rationality or exemption from criminal responsibility, in practice, many individuals charged with murder are compelled to rely upon this defence, even when they were not acting rationally, because of inadequacies within the insanity defence. Section 2 of the Homicide Act 1957 is examined, and a critique is offered of the defence, specifically with regard to the absence of any firm rationale surrounding the defence, the meaning of mental responsibility, and how criminal responsibility can be justifiably reduced rather than eliminated. The significant overlap with the defence of provocation is discussed, particularly in the context of the recent House of Lords decision in *Smith (Morgan)*.¹ Proposals for reforms are examined and recommendations made. Because of its close relationship with diminished responsibility, the offence of infanticide is also considered.

¹ [2000] 3 WLR 654

CHAPTER ONE

THE BASIS OF CRIMINAL LIABILITY AND ELIGIBILITY FOR BLAME

1. The Basis of Criminal Liability

An individual may be held criminally responsible for a vast range of conduct. Such conduct will usually take the form of an act or omission, but may also take the form of 'being in a particular state of affairs'. Where such a state of affairs is within an individual's control, then he may be held responsible because his conduct, in the form of an act or omission, has led to the prohibited state of affairs. This will be so even where the definition of the offence only prohibits the state of affairs, rather than any act or omission leading to such a situation. Where however the state of affairs occurs through circumstances over which an individual has no control, it should be wrong to hold him criminally responsible, given that it is an established principle of criminal law that the *actus reus* of a crime must be voluntary. Although the meaning of voluntariness may vary, the requirement that conduct should be voluntary is recognised by both the courts and legal commentators as an essential element of a criminal offence.²

1.1 Conduct must be voluntary

The conduct for which an individual may be held criminally responsible must, as a general principle, be voluntary. The requirement of voluntariness should be integral to the *actus reus* of a crime. Even crimes of strict liability should require the *actus reus* to be voluntary. Where, however, the act or omission is involuntary, this will also preclude the existence of any *mens rea*. For example, where D, carrying a pair of

² See e.g. *Bratty v Attorney General for Northern Ireland* [1963] AC 386: "The requirement that [there] should be a voluntary act is essential.....in every criminal case. No act is punishable if it is done involuntarily." Lord Denning. See also Glazebrook, 'Situational Liability' in *Reshaping the Criminal Law*, ed. Glazebrook (1978), 114.

sharp scissors, falls downstairs and inadvertently kills P, arguably, his involuntary conduct is more fundamental in explaining his lack of liability for murder. His conduct is involuntary; his lack of *mens rea* should not distract attention from the fact that on a correct analysis there is no *actus reus* attributable to him.

Voluntariness may consist of a voluntary act involving a willed muscular movement. Conversely, when D has his arm lifted by X so that D strikes P, there is no willed muscular movement and D's conduct is involuntary. However, this description does not adequately explain voluntary conduct through an omission. For example, where D omits to extinguish a fire which burns down a house, there is no muscular movement. Yet, if D is under a duty to act, arising, for example out of his contract of employment, he will be held criminally responsible for his failure to act.³ In such situations, a more appropriate view is that voluntariness requires a degree of control. Where his lack of activity is within D's control, his conduct is voluntary, a voluntary omission.

1.2 Requirement of an Act

It is a generally accepted requirement of criminal law that D will be criminally responsible only where he has performed an act or omission. Some theorists view omissions as exceptions to the act requirement, without adequately explaining why this should be so.⁴ While the theory that criminal conduct requires an act is capable of being descriptive of much of the criminal law, liability for omissions may not be truly exceptional. A coherent set of principles exists which sets out the duties out of which

³ *Pittwood* (1902) 19 TLR 37.

⁴ This is the view of Glazebrook, "Situational Liability" 114; see also Moore, *Act and Crime* (1993/7), 23.

liability for omissions will occur. Liability for omissions has a recognised place in the criminal law and, while criminal conduct in the majority of cases takes the form of an act, an omission ought not to be an exception simply because it cannot be explained in terms of the 'act requirement'. The explanation may lie in an individual's ability to control a state of affairs by omitting to act.⁵ Husak challenges the theory that criminal responsibility requires an act, by suggesting that there should instead be a 'control requirement'.⁶ The 'control requirement' would deny criminal responsibility to an individual for a state of affairs which he is unable to prevent.⁷ An individual will lack control where "it is unreasonable to expect him or her to have prevented" the relevant state of affairs from occurring.⁸ So, where an individual omits to act, he will be held criminally responsible if it was within his control to prevent the subsequent state of affairs from arising.

1.2.1 State of Affairs Offences

The act requirement ceases to be descriptive where there is no act or omission performed, but criminal responsibility arises from a prohibited state of affairs. Some commentators do not consider state of affairs offences to be of great importance today. Moore describes them as "rarely enacted today"; "once more prevalent than they are today"; or even invalid due to constitutional infirmities.⁹ Others point out that they are much more common and important than we might think.¹⁰

⁵ Husak, 'Does Criminal Liability Require an Act?' in *Philosophy and the Criminal Law: Principle and Critique*, ed. A. Duff (1998), 82.

⁶ Ibid., 60. See also, Clarkson and Keating, *Criminal Law: Text and Materials* (3rd ed., 1994), 93-95.

⁷ Husak, above n.5, 77.

⁸ Ibid., 78.

⁹ Moore, above n.4, 19.

¹⁰ See e.g. Glazebrook, above n.4, 116 and Howard, *Strict Responsibility* (1963), 48.

While there are offences which make 'being in a state of affairs' a crime, this should still require that the defendant was in such a position due to his own voluntary act or omission. S4(2) of the Road Traffic Act 1988 creates the offence of 'being unfit to drive through drink or drugs when in charge of a motor vehicle'. It is not the 'becoming unfit' or 'taking' charge of the vehicle which is the criminal offence.¹¹ However, the defence available under s4(3) deems a person is not in charge of such a vehicle if he proves that there was no likelihood of him driving it at the material time. While this defence appears to suggest the offence under s4(2) requires more than 'being in a state of affairs', the burden of proof ought not to be placed on the defendant. Rather, the need for some form of voluntariness ought to be specified in the offence.

It would be wrong to hold an individual responsible for a state of affairs over which has no control. It would be wrong, for example, to punish an individual for having red hair. However, aside from moral considerations as to whether such conduct may be criminalised, it would not be unwarranted in terms of the voluntariness requirement to punish an individual for dying his hair red as this is conduct over which he has control. Glazebrook¹² suggests "It must surely be unthinkable that parliament should ever consciously provide that a person who had neither done anything nor been at fault in not doing something should incur criminal liability." This view was also held in *Lim Chin Aik v The Queen*,¹³ where the Privy Council allowed an appeal against conviction where the defendant could not have ascertained he had fallen within a newly created category of proscribed person leading to a conviction under an

¹¹ J.C. Smith, *Smith and Hogan: Criminal Law* (9th ed., 1999), 42.

¹² Glazebrook, above n.4, 118.

¹³ [1963] AC 160.

unpublished immigration ordinance. The court found it could not have been the aim of the statute to find “a luckless victim”.¹⁴ The court would not put the defendant under strict liability for a state of affairs entirely beyond his control. The court held that to take a contrary view would mean an individual’s perfectly lawful conduct of remaining in Singapore would suddenly change and become criminal when an order prohibiting him from entering the country was made. *Mens rea* was therefore required.¹⁵

However, while state of affairs offences may be viewed, generally, as exceptions to the ‘act requirement’, they may be better described as mistakes where an individual’s conduct which has led to a prohibited state of affairs was apparently involuntary. There are a number of cases which warrant consideration.

In *Larsonneur*¹⁶, the defendant was convicted of “being an alien to whom leave to land in the United Kingdom has been refused was found in the United Kingdom.”¹⁷ She had been brought to the United Kingdom by the Irish Free State Police, a situation over which she had no control. The Court of Criminal Appeal found the circumstances under which the defendant returned to be “perfectly immaterial, so far as this appeal is concerned.”¹⁸ Had the defendant’s conduct in *Larsonneur* been voluntary, there would have been nothing to make the case noteworthy. A ‘state of affairs’ offence is not objectionable where the defendant’s conduct leading to such a state of affairs is voluntary. However, where there is no voluntary conduct, i.e. where

¹⁴ *Per* Lord Evershed, 174

¹⁵ 176. See also *Finau v Dept of Labour* [1984] 2 NZLR 396.

¹⁶ (1933) 24 Cr App R 74.

¹⁷ Contrary to Arts. 1(3)(g) and 18(1)(b) of the Aliens Order 1920, as amended.

¹⁸ *Per* Hewart LCJ, 78.

D has no control over the state of affairs, it should be wrong to hold D criminally responsible.

Lanham sought to explain the decision in *Larsonneur* as barring a defence of compulsion due to the fact that the defendant brought the situation upon herself. As it was only “at the last moment” that her conduct was involuntary, she was justly convicted.¹⁹ Further support for this proposition lay in the suggestion that “the preceding deliberate acts of the appellant” were not wiped out by the subsequent physical compulsion which resulted in her being found in the United Kingdom.²⁰

While such arguments, if successful, would assist us in the pursuit of a coherent system of criminal law, they are not persuasive.²¹ To suggest that the defendant brought the act of compulsion on herself is a form of voluntary conduct which is too remote to allow it to be linked to the proscribed state of affairs which constitute the crime. This is the same as suggesting that she committed the voluntary *actus reus* of one offence and ought, therefore, to have been convicted of the another crime, for which her *actus reus* was involuntary. Husak argues that the injustice in *Larsonneur* stemmed from her lack of control rather than the absence of an act.²²

The decision in *Larsonneur* remains irreconcilable with the principle that D must have some control over the state of affairs she is in. The decision is not on its own. In

¹⁹ Lanham, ‘*Larsonneur* Revisited’ [1976] *Crim LR* 276 at 279

²⁰ Doegar, ‘Strict Liability in Criminal Law and *Larsonneur* Reassessed [1998] *Crim LR* 791 at 795

²¹ J.C. Smith, [1999] *Crim LR* 100, rejects these arguments, citing the Crown’s successful proposition that “...how she got [t]here makes no difference at all. The word ‘found’ was used deliberately in the section so that if any alien who has no right to be here is here an offence is committed.” (24 Cr App R 74), 76-77.

²² Husak, above n.5, 84-85.

Winzar v Chief Constable of Kent,²³ the Divisional Court affirmed the conviction of D, who had been found drunk in a hospital, removed by the police who then charged him with being found drunk on a highway. By contrast, a decision of the Supreme Court of Alabama of similar facts²⁴ found that voluntariness was required. Where D was involuntarily removed from his home in an intoxicated state and arrested for being drunk on a public highway, his conviction was overturned. Also, in *O'Sullivan v Fisher*,²⁵ an Australian case, the same conclusion was reached on similar facts to *Martin*. Other jurisdictions respect the fundamental requirement for voluntariness unlike the courts in *Larsonneur* and *Winzar*.²⁶ Yet, in *Crump v Gilmore*,²⁷ parents of a school-age child were convicted under s39(1) of the Education Act 1944, which provides for parents to be guilty of an offence where a child fails to attend school regularly without reasonable excuse, despite proving they knew nothing and had no reason to know of the absences. The Divisional Court recommended that the magistrates should give an absolute discharge if they believed the parents. This mitigation ought not to have been necessary. The provisions of section 39(1) appear relevant to situations where parents deliberately keep their child away, i.e. through voluntary conduct which creates a state of affairs.

Clarkson and Keating suggest²⁸ that *Martin* was arrested at home and therefore in no way to blame for this situation, while it may be suggested that the defendants in *Larsonneur* and *Winzar* brought their convictions on themselves. As already discussed, such arguments are unconvincing. The reasoning in *Martin* should form

²³ The Times, March 28, 1983 Co/1111/82 (Lexis).

²⁴ *Martin v State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

²⁵ [1954] SASR 33.

²⁶ See also *Achterdam* 1911 EDL 336 and *Palmer-Brown v Police* [1985] 1NZLR 365.

²⁷ [1970] Crim LR 28.

²⁸ 109.

part of the general principles in English criminal law. *Winzar* may be further criticised. Not only was the offence procured by the police, but the court held that 'being found drunk' meant 'perceived to be drunk'. The point at which this must surely have occurred was when the defendant was found slumped in the hospital.

The decisions in *Larsonneur* and *Winzar* ought not to be followed or repeated. Care must be taken to avoid the creation of new offences making 'being in a state of affairs' criminal in circumstances where the individual is unable to control the materialisation of the relevant state of affairs and future decisions ought to be made in this light. Otherwise, we risk criminalising 'being' rather than 'doing'. Any consideration of an individual's eligibility to be held criminally responsible must be made in the context of D's conduct, i.e. act or omission, being voluntary or, exceptionally, D being in a state of affairs prohibited by law, a state of affairs by his previous voluntary acts or omissions.

1.2.2 Crimes of Possession and Addiction

Crimes of possession should be defined so as to include an act or omission.²⁹

Certainly, it must be wrong to hold an individual responsible for being an addict, but what of taking illegal substances while an addict? In *Robinson v California*,³⁰ the Supreme Court considered a state law making it a criminal offence to 'be addicted to the use of narcotics'. The court held that imprisoning an individual for such an offence was a cruel and unusual punishment and therefore unconstitutional. In applying *Robinson* in the case of *Powell v State of Texas*,³¹ two opposing views

²⁹ Glazebrook, above n.4, 119.

³⁰ 370 US 660, 8 L Ed 2d 758 (1962).

³¹ 392 US 514 (1968).

emerged from the Supreme Court. D was convicted of 'being found in a state of intoxication in any public place.' His defence was that, as a chronic alcoholic, his conduct was involuntary, and the trial court ruled that this was no defence. While the Court held that *Robinson* did not apply because the crime was not to be an alcoholic, dissenting opinions regarded Powell's conduct as involuntary and considered *Robinson* stood for a principle disallowing penalties inflicted upon a person for being in a condition he is powerless to change.

The dangers of going too far along this road are clear. The links between addiction and crime militate against allowing addiction as a state which gives rise to a lack of voluntariness. The criminal law must exist primarily as a method of social control. To allow an addiction-based defence would defeat this purpose on a widespread scale.³² The suggestion that responsibility should depend on the extent to which the addict is able to control his use of drugs³³ may still be too dangerous a road to follow. Addiction based crime may have to be viewed as a necessary exception to the general rule.

1.2.3 Liability for Thoughts

To impose criminal responsibility for thoughts is not a welcome prospect in the majority of situations nor is it descriptive of criminal law currently. Under the 'act requirement' the imposition of criminal liability for thoughts could neither be explained nor justified. The principal flaw of the 'control requirement' is that it is unable to exclude such a possibility. If the control requirement is to be favoured, then

³² The Home Office estimates one third of 'acquisitive crime' is drug-related. See Editorial Comments [1999] *Crim LR* 767 on a report by NACRO, *Drug Driven Crime* (1999).

³³ Husak, above n.5, 81.

imposing criminal responsibility for thoughts must be a possibility, there being no requirement of any act. Husak suggests that this would allow the scope of the law relating to inchoate offences to be expanded to situations where, for example, a suspect is apprehended and admits he was about to rob a post office but had not yet gone beyond mere preparation.³⁴ However, the danger of this theory lies not only in the need for evidence, in the absence of any confession, which is best demonstrated by an act, but also in its extension of criminal liability to thoughts over which one has no control. While Husak suggests what is required is a "firm intention",³⁵ how is such an intention to be defined and demonstrated? Where the 'act requirement' is unable to accommodate a satisfactory explanation of omissions, the 'control requirement' is unable to exclude the possibility of imposing criminal responsibility for thoughts.

It is suggested that the act requirement is to be favoured. It remains the case that the vast majority of criminal offences will require conduct in the form of either an act or, less frequently, an omission, and those offences which do not require either must be viewed either as exceptions or mistakes.³⁶

1.2.4 The Human Rights Act 1998

While it is likely that the Human Rights Act 1998, which implements the European Convention on Human Rights (ECHR) into domestic law,³⁷ will be concerned principally with criminal process and sentencing, certain changes may be required within the substantive criminal law.

³⁴ Ibid., 89.

³⁵ Ibid., 89.

³⁶ Ibid., 66-67.

³⁷ S3.

The classification of conduct as criminal may conflict with article 3 of the ECHR which states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Arden gives the example of a factory owner who is prosecuted for a strict liability offence when he accidentally pollutes the surrounding environment.³⁸ If he successfully argues that the conviction will seriously damage his reputation, and can demonstrate that he took all measures to avoid the pollution, could his rights under article 3 be infringed? It is feasible that such an issue could be raised also in relation to involuntary state of affairs offences. An individual who has no control over the state of affairs in which he finds himself, and is subsequently convicted of a criminal offence, might argue that he has been subjected to a degrading punishment. Such an interpretation would provide a welcome justification for the courts to move away from the decisions in *Larsonneur* and *Winzar*.

Other articles of the ECHR may result in less discord. While article 14 gives a prohibition from discrimination, this is not a free-standing provision. It only provides that access to the rights set out in the Convention is equal.³⁹ This may appear to give equality of access to a fair trial, for example, but will not extend to prohibiting legislation making certain conduct criminal, which discriminates against a group of individuals.

³⁸ The Hon. Mrs Justice Arden DBE, "Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission's Perspective and the Need for a Code." [1999] *Crim LR* 439, 450.

³⁹ Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, (1995), 463; Wadham and Mountfield, *Blackstone's Guide to the Human Rights Act 1998*, (1999), 111.

2. Eligibility for Blame

When are we entitled to assume that a person, all other things equal, is a morally responsible agent who can fairly be held responsible for his conduct? Certain individuals ought not to be considered eligible for blame for their actions. An individual who is not eligible to be held criminally responsible ought not to be tried and should, ideally, have no need for a criminal defence. Criminal defences, strictly called, should exist for situations where, under normal circumstances, we would blame an individual for his conduct, but find a particular reason to remove such blame. Where D is old enough to appreciate he must not commit theft, is able to control his actions accordingly and is not in a delusional or affected state of mind, we will attribute blame to him if he steals. Only subsequently will we remove blame when we learn of exculpatory conditions which led him to act as he did. If, for some reason, D falls within a class of individuals who ought to be considered ineligible for blame, then his complete exemption from blame should mean he does not need to be excused at a later point. Arguably, he ought not even to be required to stand trial. Children under the age of ten fall within such a classification. The same may be true of a defendant who is found unfit to plead. Although there will still be a hearing, its purpose is not to attribute blame or to punish.

There may be other individuals too, such as personality disordered persons and psychotic individuals who, like infants, lack the capacity for effective moral evaluation of conduct. If these conditions can be reliably identified they should be held to preclude a criminal trial. One should recognise however that reliable means of identification of these conditions whenever they arise is not to hand at present. For a long time to come a great many of these cases will arise in the course of insanity pleas

and claims of diminished responsibility. Nonetheless, an examination of who should be eligible for blame is relevant where pre-trial means of identification are to hand and also of the debate and proposals for the protective confinement of personality disordered individuals.

2.1 Moral agency

While, some crimes appear to require no form of moral wrongdoing but merely exist as a form of social control,⁴⁰ it is usual to expect serious *mala in se* crimes to be linked with moral blame.⁴¹ When we find a person liable for such crimes we are expressing a moral criticism.⁴² This is because our laws may be seen as the expression of “our moral attitudes and not merely devices we calculatingly employ for regulation purposes.”⁴³ So when we find a person criminally responsible, it should be on the basis of a proven culpability meriting blame and punishment.⁴⁴

To justify moral blame, a person’s act must warrant our disapproval and the person must be responsible for that act.⁴⁵ It follows that a person should not be blamed for carrying out a serious crime for which he was not morally responsible. Accordingly, defences such as insanity, automatism and duress negate a person’s criminal responsibility, undermining any moral judgment to be made against the defendant.

⁴⁰ Although it is possible to argue that all crimes involve making a moral judgment against the defendant for failing to conform to a standard required by law.

⁴¹ Arenella, “Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability”, 39 *UCLA L. Rev.* 1511, 1513.

⁴² Kadish, *Blame and Punishment*, (1987), 87.

⁴³ Strawson, *Freedom and Resentment*, (1974), 25.

⁴⁴ This has not been the view taken by the courts. The Privy Council in *Yip Chiu-Cheung* [1994] 2 All ER 924 held that no additional element of culpability was required above the *mens rea* for common law conspiracy. The House of Lords in *Kingston* [1994] 3 ALL ER 353 would not allow a defence of intoxication where the defendant was still able to form the *mens rea* for a crime, despite being under the influence of drugs or alcohol.

⁴⁵ Kadish, above n.42, 141.

Moral responsibility may be taken away from a moral agent where, for example, in fear of violence, the reasonable person would have done as he did. The defendant would have a defence due to the state of affairs in which he was placed. However, it is also necessary that we do not blame an individual who is ineligible to be held criminally responsible and whose conduct ought not, therefore, to be judged by the criminal process.⁴⁶

It may not be sufficient however, to say that a person is a moral agent because he is an adult and is not insane. The question must be how much of an understanding of moral rules and moral sentiments is required to constitute a person a moral agent? There are two possibilities. The first is that an intellectual knowledge of rules, a capacity to understand their content, is sufficient to make the defendant a moral agent. There is no additional requirement that the agent has any sense of moral obligation or a capacity for identifying with the concerns of others. Alternatively, we might require an understanding of the concept of morality and a sense of moral obligation as well as a knowledge of rules for a person to be regarded as a moral agent. These competing perspectives will now be addressed.

2.2 Criminal Responsibility

The need for criminal responsibility to be premised on an individual's free choice was emphasised by Hart. We find individuals criminally responsible in order to justify punishment.⁴⁷ "[U]nless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him."

⁴⁶ It is not intended to exclude the possibility of a civil form of action, where necessary, for the protection of the individual or society

⁴⁷ See Hart, *Punishment and Responsibility*, (1968), 160.

Otherwise, an individual will not be able to predict how his life may be ordered within a system of law.⁴⁸

The character and choice theories of culpability offer opposing views as to the requirements of eligibility for blame. The traditional requirements for attributing moral blame are that the defendant is a moral agent who violates a moral norm that fairly obligates compliance and is fairly attributed to the defendant's conduct.⁴⁹ The choice theorists' claim is that the defendant's capacity to choose to act reprehensibly explains why he should be seen as blameworthy. When he freely chooses to act in such a way and has the opportunity to do otherwise then he ought to be blamed. Choice theorists are prepared to attribute blame without any reference to the defendant's goals, desires, values and emotions that motivate his choice.⁵⁰

A defendant's culpability for his choice of action will depend on whether at the time of acting reprehensibly he had the 'capacity' to choose and a 'fair opportunity' to avoid acting as he did.⁵¹ While few will lack capacity to choose,⁵² more often a defence compatible with the choice theory must rely on a lack of opportunity. 'Fair opportunity' is measured objectively. So, with duress, a defendant must choose to avoid an objective evil but will not be justified, merely excused, as it may be a lesser evil than the one he chooses to carry out.⁵³

⁴⁸ Ibid., 181.

⁴⁹ Arenella, above n.41, 1520.

⁵⁰ Arenella, 'Character, Choice and Moral Agency: the relevance of character to our moral culpability judgments', in *Crime, Culpability, and Remedy*, ed. E. F. Paul, F. D. Miller, Jr., and J. Paul (1990), 65.

⁵¹ Moore in 'Choice, Character, and Excuse', in *Crime, Culpability, and Remedy*, ed. E. F. Paul, F. D. Miller, Jr., and J. Paul (1990), 35.

⁵² Choice theorists would limit this category of people to young children and the insane.

⁵³ Moore, above n.51, 40.

The character theorist's criticism of the choice theory of excuse is that it does not require any reference to be made to a defendant's understanding of morality. While the choice theory purports to require a moral agent who breaches a moral norm to have a fair opportunity to avoid doing so in order to establish culpability, it does not take account of characteristics that enable a person to be a moral agent. Nor can it explain what qualities are necessary for the defendant to be morally responsive, beyond the requirement that the defendant is rational. Arenella insists that only the character theory is able to explain moral responsiveness.⁵⁴ This is because a moral agent must have the capacity to appreciate the morality of his actions and an ability of self-revision in order to conform to a standard of morality. Such capacity cannot be explained without reference to the defendant's character. Arenella suggests that the choice theory fails because "[t]he moral agent cannot simply make a rational choice to experience the appropriate moral sentiments when he wishes to act morally."⁵⁵ Moral agency requires at least some capacity for moral insight and self-criticism.

In defence of the choice theory, it has been suggested that if a theory of criminal culpability required an understanding and a sense of morality, exemption from criminal liability would radically increase. Many people lack a deep engagement with morality and the importance of moral considerations in our lives can be over-exaggerated. We are more often motivated by friendship, love or self-interest rather than moral principles and do not care about the interests of people outside of our "circle of care".⁵⁶

⁵⁴ Arenella above n.50, 59-61.

⁵⁵ Ibid., 79.

⁵⁶ Haji, "On Psychopaths and Culpability", (1998) *Law and Philosophy* 117, 122-125.

A central claim of the character theory is that it is a defendant's character that causes him to carry out blameworthy conduct. The defendant's character is the primary object for his responsibility⁵⁷ and, therefore, his culpability. This theory of blame stems from Hume⁵⁸ and was adopted and expanded upon by Bayles, one of the most influential character theorists.⁵⁹ In his view, it is the moral quality of the defendant's character exemplified by his conduct for which he should be blamed. A defendant should be blamed for those of his acts that demonstrate undesirable character traits.⁶⁰ Therefore the blame is related to the character traits rather than the actions of the defendant which are merely evidence of his undesirable character traits.⁶¹ Blame is not attributed to a wrongful act; we attribute the blame to a wrongful actor. Our mental qualities are the objects of praise or blame, and our actions are only signs of our mental qualities.⁶²

Duff describes character traits as "stable patterns of thought, emotion, and action."

"A person's character traits embody her settled values, concerns, and attitudes."⁶³

However, the law is only interested in character traits that lead to harmful conduct, i.e. dangerous traits of character. This is because the law is not a "general moral inquisitor".⁶⁴

⁵⁷ Moore, above n.51, 29.

⁵⁸ Bayles, "Hume on Blame and Excuse" (1976) 2 *Hume Studies* 17.

⁵⁹ Ibid.

⁶⁰ Bayles, "Character, Purpose, and Criminal Responsibility", *Law and Philosophy* 1 (1982) 5-20, 7.

⁶¹ Moore confines the relationship between action and character to the former being evidence of the latter. Statements about causal relations or behaviour which is in character open up the possibility of greater criticism: above n.51, 47-48.

⁶² Bayles, above n.50, 17. See also Pincoffs, "Legal Responsibility and Moral Character", (1973) *Wayne Law Review* 905, 923: "We are accustomed to think of acts in isolation as morally or legally right or wrong, but acts bespeak the man; and the man is in part his own creation."

⁶³ Duff, *Criminal Attempts*, (1996), 178.

⁶⁴ Ibid., 179.

It follows, where a defendant's conduct does not indicate undesirable character traits, he does not deserve to be blamed.⁶⁵ He may assert that his conduct exhibited the same qualities as a person of good character. In a character-based defence the defendant would claim that his actions were the product of his condition or the circumstances in which he found himself, where his particular condition or circumstances could not be linked to his character.

It is the 'moral capacity model' of the character theory that requires a moral agent must have the capacities necessary for moral decision making. As good character requires more than intellect and because we blame a defendant for failing to attain goodness, a moral agent must have an ability to be self-critical, and develop morally.⁶⁶

Character-based attributes should, therefore, attract moral blame, particularly for a lack of "capacity to care for the interests of other human beings".⁶⁷ Moral agents must have the capacity for self-reflection and an understanding of morality is required to know how to behave as a reasonable person. So, where a defendant fails to behave as a reasonable person the character theorist would claim it is because he did not address a particular aspect of his character earlier in his life.⁶⁸

The character theory challenges our perceptions of the types of individuals who ought not to be held criminally responsible and would render many personality disordered

⁶⁵ Bayles, above n.60, 7.

⁶⁶ Pillsbury, "The Meaning of Deserved Punishment: An Essay on Choice, Character and Responsibility", (1992) 67 *Indiana Law Journal* 719, 734.

⁶⁷ Arenella, above n.41, 1525.

⁶⁸ Arenella, above n.50, 73.

individuals ineligible to be held criminally liable.⁶⁹ For this reason, until our perceptions change on blaming individuals who are able to perceive the wrongfulness of their actions but not appreciate why such actions are wrong, the choice theory is to be favoured. It prescribes that we punish an individual for his conduct rather than who he is and is capable of explaining why an individual should be held criminally responsible in the majority of cases.

The following section will proceed to examine the types of individuals whom we ought not to blame, regardless of their conduct. This may be because they have not achieved a level of intellect to fully appreciate the consequences of their actions, as in infancy. It may be that they suffer from such a serious mental disorder that they either cannot control their actions or comprehend the nature of them. At present, in English Law, the only categories of individuals who will be considered ineligible for blame are children below the age of ten and those who are unfit to plead. The eligibility for blame of the insane, severely personality disordered, and individuals from socially deprived backgrounds will also be considered.

2.3 Infancy

There is an irrebuttable presumption that children below the age of ten are *doli incapax*.⁷⁰ The exemption from liability for infants is couched in terms of a lack of capacity. A child under the age of ten is presumed incapable of forming the *mens rea* of a crime. For this reason, he is ineligible for blame. The same may only apply to some children aged ten and above if the effect of s34 of the Crime and Disorder Act

⁶⁹ Discussed below at 2.6.

⁷⁰ Children and Young Persons Act 1933, as amended by Children and Young Persons Act 1963, s16.

1998 proves only to abolish the rebuttable presumption that such a child is incapable of committing a crime because of incapacity to know right from wrong, rather than abolishing the defence entirely.⁷¹ It is submitted that the effect will be to retain infancy between 10-14 as a status defence, where appropriate, merely reversing the burden of proof. To allow such a claim will still be to allow a defence rather than a claim to ineligibility for blame. Thus, only children below ten are ineligible for prosecution.

2.4 Fitness to Plead

An individual who is unfit to stand trial will not have to do so, nor will he be punished. The question of fitness will depend on the defendant's ability to understand the difference between guilty and not guilty pleas, to follow the evidence in the proceedings, instruct counsel and challenge jurors, although he need not necessarily be able to act in his own best interests.⁷² Since the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, a jury may find D is unfit to plead, yet the same jury or a new jury, depending on the judge's discretion,⁷³ will still be required to decide on the evidence whether the defendant "did the act or made the omission charged against him as the offence."⁷⁴ If the jury considers the defendant did not carry out the offence, it may acquit him and no further consequences will ensue. If, however, it finds he carried out the offence, the court may make a disposal as it would had there been a finding of insanity. This may range from a hospital order to an absolute

⁷¹ See also Walker, 'The End of an Old Song?' [1999] *NLJ* 64.

⁷² *Robertson* [1968] 3 All ER 557.

⁷³ S4(5).

⁷⁴ S4A Criminal Procedure (Insanity) Act 1964, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

discharge,⁷⁵ save when the charge is one of murder where an indefinite term of detention is imposed.

Until the House of Lords decision in *Antoine*,⁷⁶ a jury had to find both *actus reus* and *mens rea* of the crime to be present.⁷⁷ While the decision in *Egan* reflected the views of the Butler Committee,⁷⁸ it did not accord with the previous interpretations of such a hearing as requiring only a trial of facts.⁷⁹ Nor did the decision appear to reflect the wording of the legislation which does not refer to any finding of fault. It did offer the advantage, however, of allowing consideration, on a murder charge, to be made on the issue of diminished responsibility, thus enabling the judge to use a full range of disposal options rather than compelling detention.⁸⁰ In *Antoine* the House of Lords held, contrary to *Egan*, that the jury need not give consideration to any mental element, disallowing the prospect of a reduction in the defendant's charge to diminished responsibility.

The rationale behind finding an individual unfit to plead is the fulfilment of the requirement of a fair trial. Opinion differs as to what would constitute a fair trial where the defendant's fitness to plead is in issue. A trial may be 'fair' if it avoids an unsafe verdict.⁸¹ This may or may not involve the defendant being able to fully participate in the proceedings. There may be occasions, involving, for example, a schizophrenic man who breaks a shop window and is charged with criminal damage,

⁷⁵ S5 CP(I)A 1964 as amended by CP(IUP)A 1991.

⁷⁶ [2000] 2 All ER 208.

⁷⁷ *Egan* [1998] 1 Cr App Rep 121, 125.

⁷⁸ Report of the Committee on Mentally Abnormal Offenders, (1975), Cmnd. 6244, para. 10.24.

⁷⁹ See Grubin, "What Constitutes Fitness to Plead?", [1993] *Crim LR* 748; Duff, "Fitness to Plead and Fair Trials: (1) A Challenge", [1994] *Crim LR* 419.

⁸⁰ For a commentary, see Mackay and Kearns, "The Trial of the Facts and Unfitness to Plead", [1997] *Crim LR* 644.

⁸¹ Grubin, above n.79, 757.

where the defendant cannot fully participate, yet a safe verdict would still be reached in the proceedings, based on the clear available evidence, and such a verdict would be more expedient than drawing out issues of competency.⁸² An alternative view, which is to be preferred, is that a fair trial implies the defendant being able to take responsibility for his actions and being condemned as such. A criminal trial holds the defendant accountable and answerable for his actions. An individual who is unable to play a proper part in a criminal trial ought not to be held responsible as he cannot respond to the charges against him.⁸³ On this account, the effect of a defendant being unfit to plead and therefore stand trial is to render him ineligible for blame and punishment. The trial must represent a two-way moral conversation between the defendant and the court. This cannot occur where the defendant is found unfit to plead.

2.5 Insanity

On either the choice or character theories, it is possible to argue that those individuals who are suffering from a severe mental disorder should be excluded from blame. Such individuals do not have the capacity to choose on rational grounds how to behave, which is required by the choice theory. To such an individual, although the defence of insanity attaches an apparently correct label, it does not give an accurate description of why she should not be eligible for blame. An individual who is unable to engage, for example, in the same reality perceived by the majority of us is unable to participate in something much greater than simply being unable to understand the nature and quality of her act or that it is wrong.

⁸² Grubin, "Fitness to Plead and Fair Trials: (2) A Reply", [1994] *Crim LR* 423, 424.

⁸³ Duff, above n.79, 420-421.

Such a severely mentally disordered individual would, however, undoubtedly fall within the fitness to plead legislation. Here, the label may be inadequate, but the treatment would express more closely that the defendant is not eligible to be blamed and need not stand trial.

More appropriately, perhaps certain severely mentally disordered individuals ought not to be held blameworthy due to their lack of moral agency. Gross wrote, "what in fact distinguishes the sane from the insane under criminal law is the inability of the insane to appreciate the culpability, not the punishability, of their conduct."⁸⁴ The severely mentally disordered individual may not understand why he should be blamed, nor why he is excused, if this should occur. He is unable to take part in such a moral conversation.

A category of legal insanity, set apart from the *M'Naghten* Rules (1843) and unlinked to the issue of *mens rea*⁸⁵ but which renders the 'very insane' ineligible for blame due to their mental incapacity may present a more accurate description as to why we choose not to punish in these circumstances. It would also reflect how such defendants are dealt with prior to trial.⁸⁶ This was the suggestion of the Butler Committee. Some individuals who are 'very insane' will not fall within the *M'Naghten* Rules.⁸⁷ For example, where D kills the victim due to an overpowering urge or because he thinks the victim is spying on him, he may be suffering from a

⁸⁴ Gross, *A Theory of Criminal Justice*, (1979), 304.

⁸⁵ See Chapter 3 for a discussion as to whether insanity is a status defence or better explained as a 'lack of *mens rea*' defence.

⁸⁶ See 2.4, above.

⁸⁷ Above n.78, para. 18.7.

defect of reason due to a disease of the mind, however he may still know the nature and quality of his act and that it is wrong.⁸⁸

The Butler Committee recommended a second element to the defence of insanity which would allow a defence of severe mental disorder, where D's *mens rea* is not in doubt.⁸⁹ The Report mentions 'exempting' D from responsibility⁹⁰ and 'displacing' legal responsibility,⁹¹ which suggests the use of a new type of defence, rendering the 'very insane' ineligible for blame.⁹²

Similar criticisms are made elsewhere: "unless there is more clarity as to whether insanity is treated as a condition, like infancy, barring the jurisdiction of the court....the operation of the defence.....will continue to confound."⁹³ Wells also argues that insanity cannot be described as a denial of responsibility, as it currently stands, as so many mentally disordered defendants choose to plead guilty.⁹⁴

2.6 Severely Personality Disordered Individuals

The well-used term 'psychopaths' was passed over in the most recent Consultation Paper⁹⁵ in favour of 'DSPD individuals'. Whatever label is attached, it will remain the case that the behavioural patterns of certain individuals challenge fundamental assumptions of our criminal law, in particular those principles which determine when

⁸⁸ Ibid., paras. 18.26-18.36.

⁸⁹ Ibid., paras. 18.17-18.18.

⁹⁰ Ibid., para. 18.17.

⁹¹ Ibid., para. 18.26.

⁹² See Chapter 3, 2.1.2; 4.1.2; 5.1.

⁹³ Wells, 'Whither Insanity?' [1983] *Crim LR* 787, 787.

⁹⁴ Ibid., 795.

⁹⁵ *Managing People with Severe Personality Disorder: Proposals for Policy Development*, July 1999. See also the White Paper, *Reforming the Mental Health Act, Part II, High Risk Patients*, Cm.5016II (2000).

a person should be held liable and when a person does not deserve blame. Such principles incorporate concepts of morality into the criminal law that would otherwise be merely a system of social control. Persons unable to understand the morality of their actions, such as young children and the legally insane, are excused from blame. On the assumption that DSPD individuals lack even minimal capacity for that empathy and concern which forms the basis of secular morality,⁹⁶ ought they not also to be excused? A DSPD individual may not be capable of being a moral agent and, even where he has committed a criminal offence, may not be a suitable candidate for punitive measures.

The many different perceptions and definitions of the psychopathic personality do not give one clear picture of psychopathy. A DSPD individual is most frequently described as having no perception of morality or the emotions.⁹⁷ Psychopathy in the past has been labelled 'moral insanity'.⁹⁸ Yet, the DSPD individual has an appreciation of reality and may see that others have certain values, regardless of the fact that he is unable to share them.⁹⁹

Duff describes a DSPD individual as a person who has some concern for his own interests but sees no reason why the interests of others should have any impact on him. He has prudential reasons for following the law but has no concept of morality and so cannot understand why the law is there.¹⁰⁰ The DSPD individual does not learn from being blamed or punished. He will often have a history of repeat offending, yet

⁹⁶ Contradistinctive to 'command' moralities based on the observance of texts and doctrines.

⁹⁷ Elliott, *The Rules of Insanity: moral responsibility and the mentally ill offender*, (1996), 71.

⁹⁸ See e.g. Cleckley, *The Mask of Sanity* (1982) and Blackburn, *The Psychology of Criminal Conduct* (1997) for the development of a definition of psychopathy.

⁹⁹ Elliott, above n.97, 84.

¹⁰⁰ Duff, *Trials and Punishments*, (1986), 181.

no feelings of conscience, nor any ability to despise himself.¹⁰¹ He will not usually commit serious crimes of violence; instead minor offences are more common.¹⁰² He is hard to identify, and may possess charm and intelligence together with a capacity to mimic appropriate emotions. Hence the description of psychopathy as a 'mask of sanity'.¹⁰³

The various medical definitions of psychopathy do little to offer certainty as to who is a DSPD individual. There is a category for psychopathic behaviour under DSM-IV¹⁰⁴ in which it is described as anti-social personality disorder, while Cleckley's criteria for diagnosing psychopathy have also been widely used.¹⁰⁵ Under the Mental Health Act 1983 the legal definition of a DSPD individual is limited to a person with a disorder or disability of mind persistently resulting in abnormally aggressive or seriously irresponsible conduct.¹⁰⁶ However, the individual who falls within this definition will not necessarily be detained under the Mental Health Act because in order to be detained he must be treatable.¹⁰⁷ Psychopathic behaviour is commonly viewed as untreatable although much of the evidence for this is anecdotal.¹⁰⁸

Nor will DSPD individuals come within the legal definition of insanity. Under the *M'Naghten* Rules a person will be entitled to a defence of insanity where "at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was

¹⁰¹ Cleckley, above n.98, 208.

¹⁰² Ibid., 208.

¹⁰³ Ibid., 277.

¹⁰⁴ *Diagnostic and Statistical Manual* (DSM IV-R, American Psychiatric Association, 1995).

¹⁰⁵ Refined by Hare, *The Hare Psychopathy Checklist - Revised* (1991).

¹⁰⁶ S1(2) Mental Health Act 1983.

¹⁰⁷ Ss 3, 20, 37(2)(a) and 72(1)(b) all contain this requirement.

¹⁰⁸ Blackburn, above n.98, 382.

doing; or, if he did know it, that he did not know he was doing what was wrong.”¹⁰⁹ The DSPD individual however, knows too much and, although his condition used to be characterised as a disease, it is not considered to be so now; instead it is termed a personality disorder.¹¹⁰

Given that there may not be one accepted way of defining a DSPD individual, the legal commentator must beware of creating a category of individuals, which is either too broad or too restricted. A person with psychopathic tendencies, for example, may still show an understanding of morality, and by no means all DSPD individuals are serial killers.

The choice theorist would say a DSPD individual does not lack capacity and is a moral agent, as he knows how society views his conduct, even if he lacks any guilt or shame regarding his conduct. His culpability lies in his capacity to choose whether to breach what he recognises as a legal norm. Because he is able to recognise and comply with legal norms, he can be attributed moral blame.¹¹¹ A moral agent need only be rational and autonomous.¹¹² To the choice theorist, DSPD individuals are rational actors because “they experience pain at the hands of others, and they can see the pain they cause others. They are engaged in finding meaning in a readily comprehensible and morally challenging way.”¹¹³

¹⁰⁹ (1843) 10 C. & P. 635.

¹¹⁰ However, an inability or difficulty in controlling impulses, as was held in the case of a sexual psychopath, may still amount to an abnormality of mind for the purpose of the defence of diminished responsibility. See *Byrne* [1960] 2 QB 396.

¹¹¹ Arenella, above n.50, 66.

¹¹² Moore, *Law and Psychiatry: Rethinking the Relationship*, (1984), 49.

¹¹³ Pillsbury, above n.66, 746.

The principal disadvantage of the traditional choice theory is that it submits the DSPD individual to a system of rules which for him lack meaning. An individual with no understanding of morality must only be able to view the law as “coercive orders backed by threats”.¹¹⁴ While the law should be able to present itself as a moral claim on our obedience, a DSPD individual would not share that perception. To use Duff’s illustration, the difference between laws and gunmen is that gunmen can only use coercion to exact obedience, i.e. “Obey, or else”, whereas the law enforcers are able to say “Obey, because you ought to, or else.”¹¹⁵ While the DSPD individual has an understanding of coercion, he cannot see why he should be so coerced.

By contrast, some character theorists,¹¹⁶ would not describe DSPD individuals as moral agents. The contention is that they cannot contract in to our system of laws as they lack the necessary moral frame of reference – they are ‘outlaws’. The character theory is attractive as it appears to offer a coherence of explanation that the choice theory cannot provide in the debate on psychopaths. Moral blame should be a process of rational communication with the person blamed.¹¹⁷ Morally to blame a person is to treat him as a fellow member of the community and ought not to be seen as manipulating him into obedience.¹¹⁸ Such a discussion of blame could not be entered into with a psychopath as he lacks the qualities that make him a moral agent. The character theory explains why such qualities are required. If, like the severely

¹¹⁴ Duff, above n.100, 181.

¹¹⁵ Ibid., 182.

¹¹⁶ Although not all character theorists would agree on this point. Bayles did not believe psychopathy should excuse a defendant from blame, but that this did not mean the defendant had to be punished: Bayles, above n.58, 17-35. It is submitted that, for a character theorist, this view is inconsistent with the character theory for reasons discussed within this chapter.

¹¹⁷ Duff, above n.100, 56.

¹¹⁸ Ibid., 70.

mentally disordered, the DSPD individual is unable to understand why he should be blamed, the character theory suggests he ought not to be held eligible for blame.

However, until we have in place adequate measures for the detention through civil process of such dangerous individuals, until we have sufficient medical knowledge of their condition to enable their identification and assist in altering the public's perception of them, the character theory will remain unacceptable. The choice theory allows for the removal of a dangerous person from society. The DSPD individual, if regarded as a moral agent, cannot escape criminal liability or punishment unless, for reasons unassociated with his psychopathy, he falls within one of the criminal defences. The choice theory satisfies society's desire for retribution. DSPD individuals do not usually come into the public eye until there is a good reason for condemnation of them. To hold them criminally liable satisfies our need to have someone to blame when an atrocity is committed. We do not yet wish to have our perception of such individuals challenged and the choice theory does not challenge it.

Bentham argued the threat of punishment would not deter people who committed a crime due to their mental condition and this is so for DSPD individuals.¹¹⁹ Duff also suggests that such an individual may not be justifiably punished for failing to obey the law because he cannot be obliged by a law to which he cannot relate.¹²⁰ However, it will depend on the purpose of punishment whether a DSPD individual may be justifiably punished. Only if the purpose is individual deterrence, is there no utility in punishing a DSPD individual who cannot learn from his punishment.¹²¹ As other

¹¹⁹ Bentham, *An Introduction to the Principles of Morals and Legislation*, Ch XIII "Cases Unmeet for Punishment", (1978), 77.

¹²⁰ Duff, above n.100, 182.

¹²¹ Ibid., 264.

purposes of punishment are general deterrence and protection of the public by removal of a dangerous offender from society, there can be still social utility in punishing him.

2.7 Social Deprivation

It must be considered whether social deprivation should be an additional consideration in determining eligibility for blame. If we are claiming that moral blame is the basis of criminal law and that an individual should only be blamed where he has a free choice not to commit a crime, then, as social deprivation influences choice to a large extent, why should it not be a factor in excusing blame?¹²² Individuals who have grown up in social situations where they have been exposed to severe poverty and witnessed violent crimes as the norm may have an inadequate appreciation of morality and insufficient opportunity to avoid continuing a cycle of crime. Bazelon suggests¹²³ that “if a ‘socio-economic situation’ can render one impervious to trauma, would it not also render one impervious to the sanctions of the law?” A youth from a social background in which he has been educated in telling right from wrong, has not been deprived of material comforts and has good prospects for the future, ought to be held more morally culpable when he breaks the law than the individual who, for example, steals because he knows no better. It may be correct that the youth who has not been materially deprived finds it easier not to break the law, however, while social deprivation may remove choice of lifestyle to a large extent, it does not remove entirely the choice to comply with the law. That choice may be more difficult, but it still exists as a choice because not all socially deprived individuals commit crimes nor

¹²² See Bazelon, “The Morality of Criminal Law”, in *Criminal Law*, Ed. T. Morawetz, Dartmouth Publishing, (1991), 7.

¹²³ *Ibid.*, 13.

would the majority of such individuals wish to be perceived in such a way. Not all children below the age of ten commit crimes. Their lack of criminal responsibility is due to their perceived lack of capacity. Should insanity be allowed as a status defence, the same argument might apply. To suggest that individuals who are socially deprived lack capacity to be criminally responsible due to their lack of choice is to take a deterministic view which will ultimately suggest that none of us is responsible for any of our actions. Certainly, we are all subject to external pressures at times which make our choices harder.¹²⁴ To suggest that the lack of criminal responsibility is due to a status held by socially deprived individuals is discriminatory and disturbing. Defences are recognised where there is a "general social consensus" that the defendant's choice was too hard to make, and it is unlikely that such a consensus would be achieved for a poverty defence.¹²⁵ While poverty may be a causal factor which leads to crime, it is merely a contributing factor and does not remove the free choice of an individual.

Similar arguments apply to the inheritance of character traits by virtue of a person's genes.¹²⁶ We may be more likely to blame when the cause of harm is human rather than a natural cause,¹²⁷ yet if we become increasingly able to attribute an individual's character traits to his DNA, and discover a predisposition to crime, ought we to remove his responsibility due to the fact he was not acting entirely freely? This theory, as with social deprivation, is unlikely to attract much support. A disposition to crime will not be sufficient to guarantee the actor has no free choice at all. He may find certain impulses harder to resist, but it is unlikely we can say he could not help what he did. In any event, we would not wish to give such blanket exemptions. An

¹²⁴ Morse, "The Twilight of Welfare Criminology", in *Criminal Law*, Ed. T. Morawetz, (1991), 29-30.

¹²⁵ *Ibid.*, 30-32.

¹²⁶ Wells, "'I Blame the Parents': Fitting New Genes in Old Criminal Laws", [1998] 61 *MLR* 724

¹²⁷ *Ibid.*, 727.

individual with a predisposition to crime is the very individual from whom we expect to be protected.

“It is important for criminal doctrine to limit the role of excuse....As soon as the phenomenon which is sought to excuse moves away from the exceptional, the harder it is for criminal law to see it.....Factors such as family background, social and economic circumstance, all of which may have both an explanatory and an excusing force, are....out of bounds.”¹²⁸ There are many reasons why an individual may be driven to commit a crime. If we are prepared to excuse for such reasons, we take away the purpose of a system of criminal law.

Wells viewed the reaction of the House of Lords in *R v Kingston*¹²⁹ as an indicator of the probable reaction to a genetic-based defence.¹³⁰ The defendant, who had paedophiliac tendencies, claimed he indecently assaulted his victim due to the effect of sedative drugs which were involuntarily administered to him. Despite this, he was still capable of forming the necessary *mens rea*. The House of Lords in this case would not recognise a new defence at common law. From this case, it appears there is a reluctance to recognise that a choice which is extremely difficult to make will not be a free choice. The same must also be true for any defence of social deprivation. While there is support for the new type of defence upon which the defendant in *Kingston* sought to rely,¹³¹ as will be discussed below, social deprivation or genetic dispositions will not fall into any such exceptional category.

¹²⁸ Ibid., 735.

¹²⁹ [1995] 2 AC 355.

¹³⁰ Wells, above n.126, 735.

¹³¹ See e.g. Sullivan, “Making Excuses” in *Harm and Culpability*, ed. Simester and Smith, (1996).

3. Conclusion

Criminal conduct may take the form of an act, omission or, exceptionally 'being in a state of affairs' and must be voluntary. The requirement of voluntariness is especially pertinent where such conduct involves 'being in a state of affairs'. An individual ought not to be held responsible for a state of being over which he has no control. A 'state of affairs' offence ought not to be held to apply to circumstances where an individual is powerless to prevent such a state from existing.

An individual who lacks moral agency ought not to be eligible to be held criminally responsible. For practical reasons, moral agency should involve the ability to understand legal rules and the consequences of their breach, rather than requiring a deeper capacity to engage in a moral understanding of such rules, and even a minimal capacity will suffice to make D a moral agent, regardless of how difficult it may be for an individual to comply with the law. As the law stands currently, this renders all but children below the age of ten moral agents and exempts those individuals unfit to plead for the procedure of a trial. If ineligibility for criminal responsibility is to be extended at all, then certain severely insane individuals ought to be afforded a similar position within the law as they lack capacity on either the choice or character theories of criminal responsibility. All other individuals may be held criminally responsible unless circumstances exist which are capable of excusing or justifying their criminal conduct due to a lack of either capacity or fair opportunity.

CHAPTER TWO

PREVENTATIVE DETENTION OF DANGEROUS INDIVIDUALS

1. Introduction

Certain severely mentally ill individuals, who are not eligible for criminal responsibility due to their lack of moral agency, may exhibit dangerous behaviour. Equally, society may require protection from dangerous severely personality disordered individuals who have not yet committed a criminal offence, or whose detention is necessary beyond the level of their culpability. Where the purpose of detention is not to punish, then this should occur within the civil law. Where preventative detention is available through civil process, it can no longer be justified within the criminal law. We must be careful to treat fairly and consistently all individuals who are not deserving of punishment, but who may nonetheless require to be detained in the public interest.

This chapter will examine the issues involved in detaining those individuals who remain a danger to society but who cannot be held criminally responsible, and those individuals who require detention beyond the level of their culpability. Existing measures for preventative detention within the criminal law and mental health legislation will be considered alongside proposals for changes in these areas of law. The problems concerning accurately predicting dangerousness and the potential conflict with the Human Rights Act 1998 will also be examined.

2. Preventative Detention

2.1 Current Measures For Preventative Detention within the Criminal Law

Preventative detention is already in use within the criminal justice system. Penal measures may be imposed which go beyond the level of a person's culpability. The discretionary life sentence consists of two parts: the 'relevant' part which is specified by the judge passing the sentence and represents the period of punishment;¹³² and the remaining part which is dealt with by the Secretary of State and is determined by considerations of risk to the public.¹³³ A discretionary life sentence may be imposed where the offender has been convicted of a very serious offence and there are good grounds for believing he may remain a serious danger to the public for a period, which cannot be determined at the date of sentence.¹³⁴ Such grounds will often relate to mental conditions which could not allow for detention under the provisions of the Mental Health Act 1983.¹³⁵ In addition, the offender need not have previous convictions¹³⁶ in order for the court to exercise its power under s80(2)(b) of the Powers of Criminal Courts (Sentencing) Act 2000.¹³⁷ Considerations which go beyond the defendant's level of culpability feed into the decision not only whether to impose a discretionary life sentence but also as to determination of its length.

Section 109 of the Criminal Courts (Sentencing) Act goes further and requires a court to give reasons why a life sentence should *not* be passed rather than why it should.

Where a defendant commits a serious offence, having previously committed a serious

¹³² S34 Criminal Justice Act 1991. See also s85 Powers of Criminal Courts (Sentencing) Act 2000.

¹³³ Practice Direction (Crime: Life Sentences) [1993] 1 WLR 223.

¹³⁴ *Attorney-General's Reference No. 32 of 1996* [1997] 1 Cr App R (S) 261.

¹³⁵ Ss3, 20, 37(2)(a) and 72(1)(b) all contain this requirement.

¹³⁶ *R v Smith (Wayne Anthony)* (1999) *The Times*, 22 June 1999. Formerly, the same provision was contained within s2(2)(b) Criminal Justice Act 1991.

¹³⁷ This provision states that a custodial sentence shall be "... where the offence is a violent or sexual offence, for such longer term (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

offence,¹³⁸ the court must impose a life sentence unless there are exceptional circumstances to justify not doing so. The intention of Parliament was “to alter the existing law by extending the power and imposing a duty to impose a life sentence.”¹³⁹ Initially, a narrow approach was adopted towards this provision in *R v Kelly Attorney-General’s Reference (No. 53 of 1998)*. However, since the Court of Appeal decision in *R v Offen*,¹⁴⁰ the provision must be applied so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public, to avoid bringing it into conflict with articles 3 and 5 of the ECHR.¹⁴¹ A judge remains obliged to pass a life sentence, unless the offender “poses no significant risk to the public”¹⁴² and must provide reasons if he does not do so. However, sensibly, this decision represents a more flexible approach to the application s109.

Existing legislation allows the detention of offenders who are considered to be a danger to the public. They are detained not for what they have done in the past but for what dangerous conduct they may undertake in the future. If we are prepared to accept that this is necessary and justifiable, it is only one, though significant, step further to allow the detention of a class of people who have not previously committed a serious offence, yet pose a serious risk.¹⁴³

¹³⁸ A serious offence is defined under s109(5) and includes, *inter alia*, attempt, conspiracy or incitement to commit murder; soliciting murder; manslaughter; wounding or causing grievous bodily harm with intent.

¹³⁹ *R v Kelly Attorney-General’s Reference (No. 53 of 1998)* [1999] 2 All ER 13, 21.

¹⁴⁰ [2001] 2 All ER 154.

¹⁴¹ *Ibid.*, 175.

¹⁴² *Ibid.*, 176.

¹⁴³ In *Managing People with Severe Personality Disorder: Proposals for Development*, July 1999 (“the Consultation Paper”) the Government estimates there are 1400 men in prison who fall into the category of DSPD individuals and 400 male patients detained on court orders under the category of psychopathic disorder in secure psychiatric hospitals. It is estimated there are between 300 and 600 DSPD individuals in the community well known to social services and the local police due to their dangerous and demanding behaviour: 9, paras. 3-5.

DSPD individuals¹⁴⁴ are already being detained for the protection of society. Of the estimated 2000 DSPD individuals in England and Wales, most are in prison or secure hospitals.¹⁴⁵ The Consultation Paper *Managing People with Severe Personality Disorder: Proposals for Policy Development* proposes to continue and extend preventative detention to such dangerous individuals who have committed no criminal offence.

The Consultation Paper outlines two options for the preventative detention of individuals with a severe personality disorder. Option A would retain the present legislative framework with amendments.¹⁴⁶ Under Option A there would be provision for greater use of the discretionary life sentence.¹⁴⁷ The treatability requirement, which is a condition for detention of patients under the Mental Health Act 1983,¹⁴⁸ would be removed for the DSPD individual. Hospital and prison facilities would be improved to deal better with such individuals.

Option B would create new criminal and civil powers for the indeterminate detention of psychopaths.¹⁴⁹ A 'DSPD direction' could be attached to any sentence¹⁵⁰ allowing for detention in a new specialist facility. Such an order could also be made during an offender's detention in prison resulting in the individual's transfer from prison to specialist facilities. The same result could alternatively be achieved through civil proceedings where there has been no criminal conviction.

¹⁴⁴ See Chapter 1, 2.6.

¹⁴⁵ The Consultation Paper, 3.

¹⁴⁶ Ibid., 14, paras. 14-19.

¹⁴⁷ The availability of the discretionary life sentence may be extended to a wider range of offences.

¹⁴⁸ Above n.135.

¹⁴⁹ The Consultation Paper, 16, paras. 24-26.

Under the new legislation, in criminal cases, the court would make a decision for a compulsory order which would be based partly on the availability of treatment. Similar proceedings would apply to the DSPD individual where initially it would be unclear whether he is suffering from a severe personality disorder or some other mental disorder.¹⁵¹ There would be a single power to remand for assessment which would exist irrespective of subsequent disposal. For a DSPD individual, assessment in hospital may be followed by assessment in a specialist unit.¹⁵²

The White Paper, *Reforming the Mental Health Act, Part II, High Risk Patients*,¹⁵³ noted that the majority of views taken in response to the Consultation Paper favoured Option B, but, before making any decisions, has implemented pilot projects in order to evaluate the assessment and treatment of such individuals.¹⁵⁴ The term DSPD individual was noted to be only a working definition which would be refined as a clearer picture emerged of the nature and characteristics of such an individual.¹⁵⁵

For the detention of such individuals through criminal proceedings, there would be simplified procedures for the courts to obtain medical assessment and to order treatment at any stage of the trial.¹⁵⁶ The options available to the courts would range from a disposal through the criminal justice system; the making of a care and treatment order; a restriction order or a hospital and limitation direction.¹⁵⁷

¹⁵⁰ Save for the mandatory life sentence.

¹⁵¹ The Consultation Paper, ch.8, para. 16.

¹⁵² Ibid., para. 17.

¹⁵³ Cm.5016II (2000), ch.2, para. 2.6. ('The White Paper, Part II').

¹⁵⁴ Ibid., para. 2.12.

¹⁵⁵ Ibid., ch.2, para. 2.18.

¹⁵⁶ White Paper, *Reforming the Mental Health Act, Part I, The New Legal Framework*, Cm. 5016I (2000). ('The White Paper, Part I'), para. 4.5.

¹⁵⁷ Ibid., para. 4.10.

In assessing the proposals for the detention of DSPD individuals, the extent to which the use of preventative detention is appropriate within the criminal justice system must be considered. We must decide whether the treatment of DSPD individuals should fall within the criminal justice system at all and consider whether we can justify the detention of individuals who have committed no offence and who are not ordinarily detainable under the Mental Health Act 1983. This will involve consideration of the extent to which it is possible accurately to predict dangerousness. Deprivation of liberty may be justifiable for the protection of society in circumstances where an individual is detained on the basis of a reliable assessment of a higher propensity for violence. However, where an individual is identified merely as potentially dangerous and is innocent of any past offence, the balance of risk may have to be borne by the public.

One uncomfortable factor raised by either proposal is that certain individuals may be detained indefinitely. If we are prepared to detain a person for the rest of his natural life, we must be sure to the highest standard of proof that we are detaining an individual who *will* commit a dangerous crime if released into society. We must also be able to confirm our certainty at regular intervals.

2.2 Mental Health Law

In implementing new legislation, the Consultation Paper must complement the proposals for a new Mental Health Act. The White Paper, *Reforming the Mental Health Act, Part I, The New Legal Framework* recommends a broad definition of mental disorder by removing categories of mental disorder.¹⁵⁸ This new definition is

¹⁵⁸ Ibid., Part I, paras. 3.3-3.5.

aimed at including personality disorders where a serious risk of harm is posed to others, moving away from the narrow concept of treatability.¹⁵⁹

The Consultation Paper *Reform of the Mental Health Act 1983: Proposals for Consultation*¹⁶⁰ appeared to place those DSPD individuals suffering from severe personality disorder and no other form of mental disorder outside of the new Mental Health Act proposals. Compulsory care and treatment was to be authorised only where a patient with capacity to consent to treatment presented “a substantial risk of serious harm to the health and safety of the patient or to the safety of other persons if s/he remains untreated, *and there are positive clinical measures included within the proposed care and treatment which are likely to prevent deterioration or to secure an improvement in the patient’s mental condition.*”¹⁶¹

However, the White Paper, Part I seems to suggest criteria for the use of compulsory powers which are wider than those contained within the MHA Consultation Paper:

- ◆ The patient must be diagnosed as suffering from a mental disorder;
- ◆ The mental disorder must be of such degree or nature to warrant specialist care and treatment;
- ◆ A plan of care and treatment must be available to address the mental disorder, and for people who are considered to be dangerous to others, the plan must be *considered necessary to treat the disorder and/or manage behaviours arising from the disorder.*¹⁶²

¹⁵⁹ Ibid., Part I, para. 3.5.

¹⁶⁰ Cm. 4480 (1999), ch.2, para. 18. (‘The MHA Consultation Paper’). These proposals have been superseded by the White Paper, Part I.

¹⁶¹ Ibid., ch.5, para. 4. (Emphasis added).

¹⁶² The White Paper, Part I, para. 3.18; also contained in the White Paper, Part II, para. 3.4. (Emphasis added).

This reduced treatability requirement, if adopted by Parliament, will almost certainly allow for the compulsory detention of DSPD individuals under any new mental health legislation. The detention of such individuals through civil proceedings would be by means of a single pathway for compulsory care and treatment, which could be broken down into three stages: decisions for use of compulsory powers; formal assessment and initial treatment under compulsory powers; and the making of a care and treatment order, initially for a period of six months.¹⁶³

3. Predicting Dangerousness

Dangerousness is currently gauged by the criminal justice system in an arbitrary manner. Where a defendant has previously committed a serious offence, the court must impose a life sentence unless there are exceptional circumstances to justify not doing so.¹⁶⁴ Despite the more liberal interpretation of this provision by the Court of Appeal in *Offen*,¹⁶⁵ a court still must look for reasons why a defendant is not dangerous rather than reasons why he is. The MHA Consultation Paper clearly envisaged the need for care in identifying a DSPD individual and assessing the risk he poses to the public. The MHA Consultation Paper proposed specialist centres be formed where an individual would be assessed over a period of several weeks by a multi-disciplinary team with input from probation, health, prison and social services. The centres would inform decisions on initial detention and provide for assessment reviews on a similar basis.¹⁶⁶

¹⁶³ Ibid., paras. 3.9-3.10.

¹⁶⁴ S109 Powers of Criminal Courts (Sentencing) Act 2000.

¹⁶⁵ [2001] 2 All ER 154. S109 must be applied so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public.

¹⁶⁶ The MHA Consultation Paper, 18-19, paras. 36-42.

In predicting the dangerousness of an individual, a distinction must be drawn between DSPD individuals who have already exhibited dangerous behaviour through committing a serious offence and those who have not yet offended, although show dangerous traits of character. Predicting the continued dangerousness of the former category may yield more accurate results than predicting the potential dangerousness of the latter, although such results ought still to be viewed with suspicion, given that an individual's right to liberty may be deprived as a consequence.

While versions of utilitarianism could justify detaining indefinitely a person who is a danger to society, the human rights issues, which such detention would raise, are far-reaching. To remove the DSPD individual's right to liberty for an indefinite period before he has even committed a crime should cause us great concern, even though such an occurrence would necessarily only occur under exceptional circumstances.

Preventative detention prevents the detainee from carrying out not only dangerous conduct but also harmless activities. Accordingly, the minimum amount of restraint should be used in order to achieve the aim of prevention.¹⁶⁷ While a person who has committed a serious offence may lose his right to be presumed harmless, there ought to remain a right to be presumed harmless and a corresponding right to liberty where there is no evidence of previous serious dangerousness. This is because it is not

¹⁶⁷ Walker, "Harms, Probabilities and Precautions" [1997] *OJLS* 611, 614.

possible to accurately predict dangerousness on all occasions even where the sample against whom predictions are made consists only of offenders.¹⁶⁸ There is as much chance of the courts being wrong as there is right,¹⁶⁹ and in a study where laymen and parole officers predicted parole survival, the laymen predicted more accurately, moreover a better result could have been predicted randomly.¹⁷⁰ Where a prediction is made which results in preventative detention, it will be impossible to prove its accuracy as the potential offender will have been taken out of circulation and will be unable to offend. As little is currently known about severe personality disorders, the validity of any predictions of risk where there has been no serious offence committed must be questioned. In a specialist centre, it is likely that specialisms will develop and much more may be learned about severe personality disorders in time. However, if either of the Government's proposals is implemented, initial decisions may be no more than steps in the dark.

4. Human Rights

All UK legislation passed before or after the implementation of the Human Rights Act 1998 must be read and given effect in a manner which is compatible with the European Convention on Human Rights.¹⁷¹ Provided that the Government's proposals are properly implemented, it is unlikely that they will contravene the Human Rights Act. Issues arising from the interpretation of Articles 5 and 6 of the Convention must be kept in mind. Article 5 provides that:

¹⁶⁸ Von Hirsh, 'Predictions and False Positives' in *Principled Sentencing*, ed. Von Hirsh/Ashworth (1992), 115.

¹⁶⁹ Floud, 'Extending Sentences for Dangerous Offenders' in *Principled Sentencing*, ed. Von Hirsh/Ashworth (1992), 125.

¹⁷⁰ Von Hirsh, above n.168, 115.

¹⁷¹ S3.

“(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...(e) the lawful detention....of persons of unsound mind,...

Deprivation of liberty will be in accordance with a procedure prescribed by law where it conforms with the applicable municipal law and is not arbitrary.¹⁷² Where the detention is under Article 5(1)(e), it will not be arbitrary provided the individual is reliably shown by objective medical expertise to be of unsound mind, the individual's disorder is of a kind or degree warranting compulsory confinement and the disorder persists throughout the confinement.¹⁷³ Given that medical expertise in the field of mental disorders is still developing, the Court is unlikely to intervene in evidential decisions by national authorities. For the same reasons, 'unsound mind' has not been given a definitive interpretation due to the medical profession's growing understanding of what may constitute a mental disorder. However an individual whose views or behaviour merely deviate from the norms prevailing in a particular society will not be of unsound mind.¹⁷⁴

Generally, under Article 5 the Court appears to allow a margin of discretion to national authorities. Detention may be justified under more than one sub-paragraph of Article 5(1)¹⁷⁵ and in *Van Droogenbroeck v Belgium*¹⁷⁶ the Court was flexible in finding that later periods of detention still related to an original court sentence and

¹⁷² *Winterwerp v Netherlands* (1979) 2 EHRR 387.

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Eriksen v Norway* 102/1995/608/696.

¹⁷⁶ (1982) 4 EHRR 443.

were authorised under Article 5(1)(a). Detention for the purpose of protecting society will be lawful¹⁷⁷ and national authorities may exercise caution in delaying release where an individual's condition has improved if the individual may be a danger to the public.¹⁷⁸

Article 5(4) entitles a person to have the lawfulness of his detention confirmed at reasonable intervals and to be released if the detention is not lawful. Under the Mental Health Act 1983, the present inability to treat DSPD individuals renders their continued detention unlawful.¹⁷⁹ The lawfulness of an individual's detention has been successfully challenged during the discretionary period of life sentences where it is now necessary to allow at reasonable intervals a challenge to the legality of such detention.¹⁸⁰ When an offender has served that part of his sentence representing his punishment, a 'court' must consider at reasonable intervals whether he still represents a threat to society. A review procedure in excess of one year for a person of unsound mind will be a breach of Article 5(4).¹⁸¹ The period may have to be shorter where there is clear evidence of some change in an individual's mental condition¹⁸² and four months has been held to be too long a period for a person of unsound mind.¹⁸³ Review procedures must take such conditions into account.

Article 5(4) is equally applicable to Mental Health Review Tribunals, entitling the detainee to have the lawfulness of his detention speedily decided and the continued

¹⁷⁷ *Guzzardi v Italy* (1980) 13 EHRR 333.

¹⁷⁸ *Luberti v Italy* (1984) 6 EHRR 440.

¹⁷⁹ S72(1)(b); *R v Canons Park Mental Health Review Tribunal, ex parte A* [1984] 1 All ER 481.

¹⁸⁰ *Weeks v UK* (1987) 10 EHRR 293; *Thynne, Wilson and Gunnell v UK* (1990) 13 EHRR 666.

¹⁸¹ *Herczegfalvy v Austria* (1992) 15 EHRR 437.

¹⁸² *M v FRG* (1984) 38 DR 104.

¹⁸³ *Koendjiahrie v Netherlands* (1991) 13 EHRR 820.

lawfulness reviewed at reasonable intervals.¹⁸⁴ Expediency of obtaining evidence will be primarily a matter for the national authorities¹⁸⁵ and the review must be in respect not only of the legality of the procedure but also the grounds for detention.¹⁸⁶ Since the implementation of the Human Rights Act, the Court of Appeal in *Regina (C) v Mental Health Review Tribunal*¹⁸⁷ has held that a routine listing of applications for hearing eight weeks after the date of application contravened article 5(4).

Article 6 concerns the right to a fair trial and covers both criminal and civil proceedings. There should be equality of arms,¹⁸⁸ a trial within a reasonable time and an independent and impartial tribunal established by law.¹⁸⁹ Article 6(2) provides for a presumption of innocence in criminal proceedings. If the detention of DSPD individuals is dealt with through civil proceedings, there is no such presumption. As it is the Government's intention to detain dangerous individuals who have not yet offended, it would be preferable to avoid using criminal proceedings because rebutting the presumption of innocence by the prediction of future conduct is likely to be impossible. However, recent cases¹⁹⁰ indicate that the courts will construe civil proceedings as criminal where they are criminal in nature, taking into account the three criteria for determining whether an individual is the subject of a criminal charge.¹⁹¹ These are 1) the classification of the proceedings in domestic law,¹⁹² 2) the nature of the offence and 3) the nature and degree of severity of the penalty that the

¹⁸⁴ *X v UK* (1981) 4 EHRR 188.

¹⁸⁵ *Eriksen v Norway* 102/1995/608/696.

¹⁸⁶ *X v UK* (1981) 4 EHRR 188.

¹⁸⁷ *The Times*, 11th July 2001.

¹⁸⁸ *Neumeister v Austria* (1968) 1 EHRR 91.

¹⁸⁹ Article 6(1).

¹⁹⁰ See *King v Walden (Inspector of Taxes)* [2001] STC 822; *Han and Yau v Commissioners of Customs and Excise* [2001] STI 87; *Murell* [2001] EHRLR 185.

¹⁹¹ *Engel v Netherlands* [1979-80] EHRR 647; *AP, MP, & TP v Switzerland* [1998] 26 EHRR 541.

¹⁹² Which will be taken as no more than a starting point: *Han and Yau v Commissioners of Customs and Excise* [2001] STI 87.

person risked incurring. Preventative detention, where it is punitive in nature, and may last indefinitely, may have to be classified as criminal. Where such detention is construed in terms of 'treatment' rather than 'punishment', the more stringent requirements of criminal proceedings may be avoided.

In summary, provided UK law is altered to allow for lawful detention where a person of unsound mind is not treatable and the conditions for detention and review of DSPD individuals are met, it is possible that measures for preventative detention can be introduced to comply with the ECHR and the Human Rights Act 1998.¹⁹³ The greatest obstacle from Europe may be meeting the required standard for a fair hearing. Is a fair hearing likely to occur if dangerousness must be shown where there is no evidence of such from past criminal conduct? What is crucial is that the evidence from which a prediction of dangerousness is made is both sufficient and transparent, and that adequate opportunity is given for the defendant to contest the allegations made against him. This will be particularly so if the proceedings are considered to be criminal, regardless of their original classification in domestic law.

5. Conclusion

While our current measures for preventative detention of dangerous personality disordered individuals within the civil law are inadequate, criminal provisions have been developed and are in use for the detention of individuals who remain a danger to society after serving the punitive element of their sentence. However, such provisions fail to address the reality of the incarceration, which is the deprivation of liberty after

¹⁹³ This view was supported by the Court of Session in *Anderson and others v The Scottish Ministers and Another*, The Times, 21 June 2000, and the Privy Council in *Anderson and others v The Scottish Ministers and Another*, The Times, 29 October 2001.

the individual has paid his debt to society. This deprivation of liberty should not take the continued form of punishment. Option B of the Government's proposals recognises that DSPD individuals are better dealt with by specialist provision under the civil law,¹⁹⁴ rendering the non-punitive element of a discretionary life sentence unnecessary.

Option B takes into account the ineffectiveness of punishment on DSPD individuals and may allow for a pooling of knowledge within the specialist centres. Since psychopathy is a personality disorder rather than a disease, treatment may be developed to involve the provision of 'coping skills' rather than a cure.¹⁹⁵ If people are to lose their liberty even though they have not yet offended, we must address their conditions of incarceration. They must suffer no disadvantages other than their incarceration. For this reason, specialist facilities described under Option B may be more appropriate than prison detention which would continue under Option A for those offenders who have served the punitive element of their sentence and are being detained in order to protect society.

However, it is debatable whether sufficient safeguards against wrongful detention could be implemented. The DSPD individual many appear completely sane, charming and even intelligent. If psychopathy is a mask of sanity, are we certain we will recognise it correctly and how many safeguards would be enough? In view of the fact that dangerousness cannot be predicted accurately, the presumption of harmlessness ought to be given to all non-offenders. Where the present sentencing law is

¹⁹⁴ The Consultation Paper, 17, para 26.

¹⁹⁵ Blackburn, *The Psychology of Criminal Conduct*, (1997), 382.

inadequate, electronic tagging and monitoring through probation or the police should be considered as a first alternative to incarceration. The constraints on a person's freedom ought to be restricted to a minimum where dangerousness can only be estimated. Only in exceptional circumstances, and then only where a person has shown repeated evidence of serious dangerousness, should preventative detention be used. There should only be a redistribution of the risk of serious harm between potential victims and potential offenders under such circumstances.

Best evidence of future dangerousness is past conduct. Predictions not solidly grounded will be unsafe. Within the criminal law we already detain an offender beyond his level of culpability, according to his dangerousness. While this may be justified in saying the offender has forfeit his right to be presumed safe by the public and the balance of risk should be borne now by him, certainly preventative detention within the criminal law should go no further than this.

CHAPTER THREE

INSANITY

1. Introduction

Insanity is a rarely used defence,¹⁹⁶ although its use has increased since the introduction of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 which provides for a greater degree of flexibility in sentencing.¹⁹⁷ While the significance of the insanity defence as a subject for academic debate may appear disproportionate to its use within the criminal law, it is at the extremes of our system of criminal law that the most serious injustices can occur and at which we are able to observe whether the system is operating correctly in accordance with principle. Quite rightly, the insanity defence remains the subject of much scrutiny and criticism.

The insanity defence in English law is very narrow in scope, applying only to those individuals who do not know, at the time of committing the offence, what they are doing or that what they are doing is legally wrong.¹⁹⁸ Any individual who suffers, for example, from paranoid delusions or irresistible urges, which lead to him offending, will have sufficient understanding of the nature of his act and its criminality not to be afforded a defence of insanity. The effect of this narrow defence is to attribute legal responsibility for *mala in se* crimes onto individuals who are unable to satisfy the conditions of the defence but who, in general terms, we view as insane.

¹⁹⁶ There were 49 special verdicts between 1975-1988. There have been 44 since the 1991 Act until 1996: Mackay and Kearns, "More Facts About the Insanity Defence" [1999] *Crim LR* 714, 716.

¹⁹⁷ *Ibid.*, 725: over 50 per cent of disposals now result in community based orders.

¹⁹⁸ The *M'Naghten* Rules will be examined in detail below at 3.

The defence must succeed in balancing two competing aims: recognition of a lack of culpability and the protection of public safety.¹⁹⁹ It is questionable whether the current defence of insanity fully addresses these aims. In order to consider these points in greater detail, the following issues will be examined below: whether the insanity defence operates as a status or excuse; the legal and moral nature of the insanity defence; the operation of the *M'Naghten* Rules; and procedural considerations, including the Human Rights Act 1998, the use of expert evidence and disposal provisions. Finally, proposals for reform will be considered and recommendations made.

2. Theoretical Considerations

Until we are able to understand and explain the purpose of the insanity defence, we are unable to say whether it is achieving its aims and, if it is not, what reforms may be appropriate. We must decide whether the defence ought, in principle, to confer an immune status on mentally ill offenders or whether it would be more appropriate to excuse them from responsibility for their actions. We must decide then under what circumstances we are prepared to remove culpability and, therefore, corresponding legal responsibility; whether this should be on the basis of a condition of mind alone, or whether there must be a causal link between the mental illness and the act.

¹⁹⁹ See e.g. comments in *Sullivan* [1983] 2 All ER 673, 677-678.

2.1 Status or excuse

The defence of insanity is perceived by some academic writers as a condition, or status, while others maintain it is an excuse.²⁰⁰ In its present form, it cannot accurately be described as a condition, although it may be preferable to be able to do so.

2.1.1. Advantages of a Status Description of Insanity

Some writers advocate a move away from causality, the requirement that the defendant's behaviour at the time of acting was caused by mental disorder, towards a status approach to the defence of insanity. Moore writes,²⁰¹ "the very status of being crazy precludes responsibility. Seeking some hidden cause of the accused's behaviour is, accordingly, beside the point." This may be particularly so where an individual is suffering from a permanent psychosis. However, while it is Moore's view that this should be correct in principle, he recognises that this does not occur in practice.²⁰²

Fingarette argues²⁰³ that insanity does not "preclude blameability or *mens rea* but it does preclude responsibility", also viewing insanity in the same way as infancy, as a status rather than an excuse. Thus, "questions of voluntariness, self-control, or intent become beside the point."²⁰⁴ It is possible to envisage such a situation with the severely mentally ill, as was recognised by the Butler Committee,²⁰⁵ for example, where the defendant's illness is of such severity and permanence that all investigations into his state of mind at the time of the *actus reus* are irrelevant. Such

²⁰⁰ Wells, "Whither Insanity?" [1983] *Crim LR* 787, 793.

²⁰¹ Moore, "Causation and Excuses" (1985) *California Law Review* 1091, 1139.

²⁰² *Ibid.*, 1109-1110. Discussed below under 2.3.2.

²⁰³ Fingarette, *The Meaning of Criminal Insanity*, (1972), 136, 141.

²⁰⁴ *Ibid.*, 141.

²⁰⁵ Report of the Committee on Mentally Abnormal Offenders, (1975), Cmnd. 6244, para. 18.17. The Law Commission opted to retain a degree of causality (*A Criminal Code for England and Wales* (Law Commission No. 177 (1989) Vol. 2, para.11.16).

an individual ought not to be viewed as a moral agent.²⁰⁶ However such a blanket status to *all* types of mental illness would carry the disadvantages outlined below.

2.1.2. *Disadvantages of a Status Description*

Currently, the insanity defence does not operate as a status defence. The defence does not offer a true denial of responsibility as a status to those who are undeserving of criminal punishment. At best, the defence will excuse the defendant for a particular set of actions and many mental conditions will not entitle the sufferer to a defence, due to a failure to satisfy the narrow *M'Naghten* Rules.²⁰⁷

The problem pointed out by Mackay²⁰⁸ in recognising insanity as a status defence is in establishing the point at which an individual ceases to be rational, because irrationality will not be a constant factor with most mentally ill individuals. While infancy can be determined by a fixed age, there is no such general point at which the condition of legal insanity can be fixed, nor would it be desirable to do so. If this were to be the case, the question then would have to be at what point does an individual cease to be legally insane? Mackay sees an analogy between infancy and insanity as inappropriate as we do not fix infancy at a particular IQ.²⁰⁹ Rather, allowing the defence of infancy reflects our attitude of support and encouragement towards children. This attitude differs to our perception of the mentally ill whom we may regard as dangerous.²¹⁰ While Arenella is of the view that we do not hold children to

²⁰⁶ See Chapter One, 2.1.

²⁰⁷ Wells, above n.200, 795.

²⁰⁸ Mackay, *Mental Condition Defences in the Criminal Law* (1995), 77.

²⁰⁹ Ibid., 83.

²¹⁰ Ibid., 84.

be moral agents as they have not yet fully developed the capacity for moral reason,²¹¹ Mackay suggests that such a view ought not to be extended to the mentally ill as, to do so, would compel extension of such a status to psychopaths.²¹² This is not necessarily so, since we may be more prepared to afford sympathy to the mentally ill than to psychopaths, who often evoke feelings of fear. The difficulty lies in determining what level of mental abnormality ought to confer a status exemption.

2.1.3. Summary

The status of individuals suffering from a mental abnormality does not and should not automatically exempt all such individuals from criminal responsibility.²¹³ While there is merit in the argument that certain severely mentally ill individuals ought to be entitled to an exemption from liability on the grounds of their status, a causal element is unlikely to be removed from the existing defence or any new defence.²¹⁴ Now may be the time to recognise that, rather than be entitled to a defence of insanity, certain severely mentally ill individuals, who are not eligible to be considered moral agents, ought to be given a blanket exemption from prosecution. However, for the vast majority of cases, the defendant will be suffering from a temporary or treatable mental condition which warrants him not to be held responsible for his actions *at that point in time*.²¹⁵ To allow a status of insanity to be conferred and removed at appropriate intervals would add unwanted complexity, both in theory and practice, to the defence.

²¹¹ Arenella, "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability", 39 *UCLA L. Rev.* 1511, 1519.

²¹² Mackay, above n.208, 85.

²¹³ See Chapter 1.

²¹⁴ Discussed below at 4.1.2.

²¹⁵ In the first five years since the introduction of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, 52.3% of Special Verdicts related to a diagnosis of schizophrenia: Mackay and Kearns, above n.196, 717, a condition which can be treated and controlled with medication.

2.2. The Moral Nature of the Insanity Defence

Fingarette writes²¹⁶ that by deciding that an individual is not a responsible agent, “we mean by this not to express a moral judgment of him but to indicate that one must abstain from judging such a person morally.” To label such a person ‘innocent’ is not the same innocence as that of a rational person, but is the innocence of an individual lacking the capacity to be a free and responsible citizen.²¹⁷ In deciding when we are to hold an individual a rational agent, Morse suggests that minimal rationality and minimal self-control or lack of compulsion are the necessary preconditions for responsibility²¹⁸ and that these conditions will apply regardless of whether the defendant has carried out the *actus reus* with the *mens rea* of the offence. In addition, the presence of irrationality and compulsion must be nonculpable.²¹⁹ We will deal with the requirements of rationality and lack of compulsion in turn.

2.2.1 Rationality

Individuals who are able to share our perceptions, values and attitudes, amongst other qualities, are eligible to be considered culpable. Where such qualities are lacking, then it is necessary to consider an individual’s rationality. ‘Rational’ may mean ‘intellectual’, ‘prudent’ or ‘wise’, but Fingarette suggests²²⁰ that irrational means not only the opposite of rational, but much more. A person may be irrational in terms of his conduct, emotions and attitude and the word needs to be used in these contexts in application to the defence of insanity. Yet, while an intoxicated person may behave irrationally for the duration of his intoxication, this is insufficient to describe him as

²¹⁶ Fingarette, above n.203, 132.

²¹⁷ Ibid., 134.

²¹⁸ Morse, in “Excusing the Crazy the Insanity Defense Reconsidered”, [1985] *Southern California LR* 779, believes that we should recognise these requirements intuitively, 782.

²¹⁹ Ibid., 787.

²²⁰ Fingarette, above n.203, 179-180.

insane. An individual must act irrationally as a result of a defect in his capacity which is a product of his 'autonomous working mind' in order to be described as insane.²²¹

Morse produces a 'working definition' of rationality as requiring consideration of "the sensibleness of the actor's goals and the logic of the means chosen to achieve them."²²² For example, a degree student would not be considered rational who had the goal of graduating but believed this could be achieved by failing to attend classes and submit assignments.

Insanity is not merely a failure to make a moral discrimination, it is a defect in the capacity to make a discrimination.²²³ It is not a failure in moral judgment, it is a failure in capacity for rational conduct.²²⁴

2.2.2. *Compulsion*

A distinction must be made between compulsion due to a lack of restraint, which ought not to give rise a defence of insanity, and true compulsion which can be described as causing irrationality. An individual who has a strong but resistible urge to kill will remain criminally responsible; one who suffers an obsessive irresistible urge to continuously wash his hands acts irrationally. Morse defines compulsion as presenting a defendant with hard choices with which society cannot expect him to comply. In order to claim compulsion, a defendant must be able to satisfy three criteria. First of all, the pain of performing the lawful act must be outweighed by the

²²¹ Fingarette, above n.203, 197.

²²² Morse, above n.218, 783

²²³ Fingarette and Hasse, *Mental Disabilities and Criminal Responsibility* (1979), 38.

²²⁴ *Ibid.*, 39-40.

pain of carrying out an unlawful act.²²⁵ Secondly, the defendant must not be carrying out the unlawful act for personal gain but must do so out of fear of the pain which would be suffered by him in carrying out the lawful act. Finally, there must be no reasonable alternative to the unlawful act.²²⁶ So, for example, a kleptomaniac who has not undergone a range of available treatments would not be able to claim compulsion.

However, where the compulsion is internal, Morse suggests it is too difficult to measure,²²⁷ and it is also unclear whether the fear of dysphoria can ever be sufficient to excuse an individual from criminal conduct except where the behaviour can only be explained as a lack of rationality.²²⁸ In such case, a rationality test may be more appropriate.²²⁹

2.2.3. Summary

Fingarette summarised²³⁰ that “[t]o impute insanity is to refer not so much to the person’s knowledge or ignorance, his beliefs or intention, or even his purportedly law-violating conduct *per se*, as it is to refer to a certain defect in the way he comes to these, a defect to which we allude when we use the phrase ‘mental disease’ in this context”. To impute insanity is to hold an individual not to be morally accountable and, so long as our system of criminal law is based on notions of morality, blameworthiness must be taken into account in attributing criminal liability.²³¹ Irrationality is the factor which must be taken into account in deciding whether an

²²⁵ Morse, above n.218, 784-785.

²²⁶ Ibid., 786.

²²⁷ Morse, “Crazy Behavior, Morals and Science: An Analysis of Mental Health Law” (1978) 51 *Southern California LR* 527, 584.

²²⁸ Ibid., 584.

²²⁹ Considered below under 4.2.

²³⁰ Fingarette, above n.203, 157.

²³¹ Morse, above n.218, 793.

individual is responsible enough to be morally accountable. Compulsion should be treated as a relevant factor only where it allows for the individual to be described as irrational.

2.3. The Legal Nature Of The Insanity Defence

If the insanity defence is to be treated as an excuse rather than a status, what is the nature of such an excuse? The insanity defence is viewed by some as a denial of criminal responsibility due to the defendant's unresponsiveness to punishment as a deterrent,²³² or represents an absence of *mens rea*. It must be queried whether the actions of an insane defendant are excused due to their being *caused* by mental illness and, accordingly, whether all conduct should be excused since all conduct is caused. As with the moral nature of the defence the construction of a legal defence of insanity should be centred more appropriately around a lack of rationality.

2.3.1. Lack of Mens Rea

One description of the insanity defence is that it operates as a defence due to lack of *mens rea*. It has been suggested that each of the limbs of the *M'Naghten* Rules, if satisfied, indicate an absence of *mens rea*.²³³ For example, a defendant who kills a baby, thinking he is strangling a cuddly toy, does not know the nature or quality of his act but also lacks the *mens rea* of murder.²³⁴ Williams suggests²³⁵ the nature and quality limb of the *M'Naghten* Rules "exempts the lunatic only where a sane person would be exempted on the ground of lack of *mens rea*."

²³² Kenny, *Freewill and Responsibility*, (1978), 84.

²³³ Williams, *Textbook of Criminal Law* (2nd ed., 1983), 644.

²³⁴ While knowledge that an act is legally wrong does not form the *mens rea* of most crimes, Williams argues that this second limb of the Rules adds nothing to the definition of the offence, 645.

²³⁵ Williams, *Criminal Law: The General Part* (1961), 482.

While it is true that the defence of insanity deals with issues surrounding an individual's cognition, this is not a complete description of the defence. The description cannot be true for crimes requiring objective recklessness, gross negligence or crimes of strict liability,²³⁶ for which no subjective form of *mens rea* must be shown. Although the Court of Appeal in *DPP v H*²³⁷ held that insanity is a defence based on lack of *mens rea* and has no relevance to a crime of strict liability, it is submitted that this is wrong.²³⁸ The defence can be seen as taking the form of either insane automatism or a lack of knowledge that an act is wrong. Automatism, whether sane or insane, is "not a denial of *mens rea*".²³⁹ Although *mens rea* may be absent under the first limb of the *M'Naghten* Rules, this limb may be more appropriately described as an involuntary *actus reus*. The defence has been used in *Hennessy*²⁴⁰ to the strict liability offence of driving whilst disqualified and, furthermore, *mens rea* is present for the second limb of the Rules. A lack of knowledge that an act is against the law does not form part of the *mens rea* for any offence: "the exculpatory force of this limb of the defence is as strong in cases of strict liability as any other."²⁴¹ J.C. Smith, in his commentary on *Antoine*,²⁴² pointed out that the decision in *Horseferry Magistrates Court, ex p K*²⁴³ that the defence is based on an absence of *mens rea*²⁴⁴ may have misled the court in *DPP v H* into its erroneous decision. In *ex p K*, J. C. Smith suggested the court failed to notice the distinction between *mens rea* as is

²³⁶ Wells, above n.200, 794.

²³⁷ (also called *DPP v Harper*) [1997] 1 WLR 1406.

²³⁸ See Simester and Sullivan, *Criminal Law: Theory and Doctrine* (2000), 167, and Ward, "Magistrates, Insanity and the Common Law" [1997] *Crim LR* 796, 802.

²³⁹ Simester and Sullivan, above n.238, 167.

²⁴⁰ (1989) 89 Cr App R 10.

²⁴¹ Ward, "Magistrates, Insanity and the Common Law" [1997] *Crim LR* 796, 802.

²⁴² [2000] 2 All ER 208; [2000] *Crim LR* 621, 625.

²⁴³ [1996] 2 Cr App R 574.

²⁴⁴ Upon which the defendant based his case.

involved in the definition of a crime and mental responsibility which is a wider concept than *mens rea*.²⁴⁵

Another criticism of this description is that individuals lacking *mens rea* will, under normal circumstances, be acquitted without requiring recourse to the insanity defence. Since the insanity defence when raised displaces the ordinary principles of criminal liability, then it demonstrates a concern with issues of disposal.²⁴⁶

2.3.2. *The Causal Theory of Excuse*

The causal theory of excuse creates some difficulty in establishing either a) whether the insanity defence can exist as a status defence,²⁴⁷ and b) whether we are indeed responsible for any of our actions.²⁴⁸ The causal theory of excuse operates on the basis that a defendant will be excused where his actions were caused by some factor not of his making. For example, with duress, the threat must cause the defendant to fear death or serious injury, and must cause him to engage in the alleged criminal conduct. Mistaken beliefs cause the defendant to behave in a certain way, thus allowing an excuse.

Insanity cannot be regarded as a status excuse by the causal theorist. An insane defendant is excused his criminal actions because his insanity caused them.²⁴⁹ This accurately describes all of the existing definitions of insanity which require a causal link between the criminal act and the defendant's state of mind at the time of

²⁴⁵ [2000] *Crim LR* 621, 625.

²⁴⁶ Wells, above n.200, 794; Fingarette and Hasse, above n.223, 26.

²⁴⁷ See above at 2.1.

²⁴⁸ Moore, above n.201, 1092.

²⁴⁹ Moore gives a detailed examination of the causal theory before rejecting it. *Ibid.*, 1101-1109.

committing the act.

The causal theorist is able to say that his theory satisfactorily describes existing legal excuses but Moore maintains that a good legal theory must do more than this. It is not sufficient that excuses follow the theory deductively; also, the theory must be morally correct. This is possible since an individual deserves to be excused where his behaviour was caused by factors outside of his control.²⁵⁰

However, the causal theory of excuse falls apart in the face of determinism. If all of our actions are caused, ought we not to be excused for everything? Since excuses “presuppose that some people are to be punished even if others are to be excused”,²⁵¹ the causal theory cannot operate as a universal theory of excuse.

Causal theorists counter this argument with degree, or partial, determinism. Some actions are less determined than others.²⁵² If freedom of choice is viewed on a continuum, then a baseline may be drawn below which actions are sufficiently free to disallow any excuse and above which actions are sufficiently determined to allow an excuse. Opinions as to where that line is drawn will result in conclusions either that the insanity defence should be abolished, as the insane have as much freedom of choice as, for example, the socially deprived²⁵³ or that an excuse of social deprivation should be created on the basis that the behaviour of those individuals seeking to rely upon such a defence is no less determined than that of the insane.²⁵⁴ Moore disagrees

²⁵⁰ Ibid., 1111-1112.

²⁵¹ Ibid., 1113.

²⁵² See e.g., Morris, *Madness and the Criminal Law* (1982), 61.

²⁵³ Ibid., 62.

²⁵⁴ Bazelon, “The Morality of the Criminal Law”, (1976) 49 *Southern California LR* 385, 394-397.

with the explanation of partial determinism, since “to speak of being partly determined or partly free makes as much sense as to speak of being partly pregnant.”²⁵⁵ Ultimately, all behaviour has a cause; some causes will be more significant than others but it makes no sense to ask “how much causation was there?”²⁵⁶

Another, less convincing, strategy in defence of the causal theory of excuse is ignorance determinism. Here, accepting that all behaviour is determined, a defendant’s responsibility is established not by the degree to which he was caused to act but by the degree to which we are able to *know* what the cause of his behaviour was. However, as Moore points out,²⁵⁷ it is immoral to allow a person an excuse on the basis of our current knowledge, but to deny one due to our ignorance.

Dualistic determinists take the view that there are two types of causation. First of all, there is ‘causation that necessitates’ and, secondly, there is ‘causation that inclines.’²⁵⁸ Only the former type of causation will excuse. The problem with this dualism is that ‘inclining causation’ may be another word for partial determinism and may be defeated by the same arguments, plus it is difficult to reconcile two types of causation as both impacting on human behaviour.²⁵⁹ Moore suggests that this must lead causal theorists to the conclusion that no one is morally responsible. In order to maintain that punishment must continue in part to depend on moral culpability, the causal theorist must either give up his theory of excuse or give up on determinism.²⁶⁰

²⁵⁵ Moore, above n.201, 1116.

²⁵⁶ Ibid., 1116.

²⁵⁷ Ibid., 1119.

²⁵⁸ Ibid., 1120.

²⁵⁹ Ibid., 1121.

²⁶⁰ Ibid., 1128.

Arguments can be advanced against the causal theorist who has abandoned determinism as follows. As far as compulsion is concerned, it is insufficient to say that a threat caused the defendant to commit a crime. The defendant must have been threatened to the extent that a reasonable and sober person, sharing certain of his characteristics, would be unable to resist. In other words, causation is not enough in itself to attribute responsibility. The actor must face a choice which is too hard to be resisted.²⁶¹ A caused act will not automatically excuse. Caused behaviour will not excuse unless the defendant lacked a fair opportunity and capacity to conform with the law.²⁶² Moore suggests that the insane are not excused because of what they are caused to do, rather they are excused because of their status.²⁶³ However, this view is not supported by current legal practice.

To summarise, Morse suggests that we may unnecessarily confuse causation with excuse.²⁶⁴ If causation were an excuse in itself, none of us would be responsible for anything. Causation is not the issue with which we should be dealing; all behaviour is caused, the issue is a nonculpable lack of rationality or compulsion. The problem this leaves choice theorists is that actors' choices must be free but 'factors that *cause* choice, being themselves unchosen, *preclude* choice'.²⁶⁵ Although the determinist's *reductio ad absurdum* is that all behaviour is caused and therefore no one is responsible for his actions, Moore suggests an individual should be held responsible for the "proximate" cause of his actions which will be based, regardless of genetic,

²⁶¹ Ibid., 1132.

²⁶² Ibid., 1136.

²⁶³ Ibid., 1137.

²⁶⁴ Morse, above n.218, 789.

²⁶⁵ Moore in 'Choice, Character, and Excuse', in *Crime, Culpability, and Remedy*, ed. E. F. Paul, F. D. Miller, Jr., and J. Paul (1990), 35.

social or other factors, on his decisions and beliefs.²⁶⁶ Mackay, agreeing with Moore, suggests²⁶⁷ that we should say an actor is responsible for actions done by his own choice, even if factors influencing his choice are unchosen. Conversely, an actor is not responsible for his actions where he lacks capacity to make his own choice. So, while all behaviour is caused, this is not the real issue. An actor is, in any event, responsible for the proximate causes of his actions which are based on his decisions and beliefs. The real issue is whether he is sufficiently rational in his decision-making and beliefs to be capable of living as a member of our community.

2.3.3. Lack of Rationality

As discussed above, the key to any insanity defence appears to be dependent upon a lack of rationality.²⁶⁸ Mackay suggests²⁶⁹ that we must consider the following factors in constructing an insanity defence: 1) are we to consider the individual's capacity for rational choice or his character? 2) what is the boundary between rationality and irrationality? 3) how is that boundary to be established?

Fingarette contends²⁷⁰ that the insanity defence should accord with all of the following:

1) it should match our intuitive understanding of the conditions which the insanity defence should encompass; 2) it should designate a condition easily associated with mental illness/disease/disorder, etc.; 3) it should be a condition where it is inappropriate to attribute responsibility; 4) it should apply to voluntary conduct, not a

²⁶⁶ Moore, *Law and Psychiatry: Rethinking the Relationship* (1984), 190-245.

²⁶⁷ Mackay, above n.208, 87.

²⁶⁸ Ibid., 75.

²⁶⁹ Ibid., 77.

²⁷⁰ Fingarette, above n.203, 174-175.

reflex; 5) it should be possible to say that the person did not have control of himself or know what he was doing or appreciate its wrongfulness; 6) it should be the definition we all have in mind when referring to the defence of insanity. The root of these conditions again appears to stem from a lack of rationality.²⁷¹

In dealing with the criteria suggested by Mackay, the accepted view on the theories of character and choice is that the choice theory should prevail.²⁷² An individual who lacks the capacity to be a moral agent will be incapable of making a free choice as to how he behaves.²⁷³ While there are many meanings to 'irrationality', Mackay recommends²⁷⁴ that it be described as 'an aberration of normal mental functioning'. The boundary between rationality and irrationality has been established through an over-reliance on medical definitions which has resulted for too long in concepts geared to treatment concerns rather than with the grounds of criminal responsibility. The alternative may be to use medical evidence in order to establish facts of the defendant's condition and allow the jury to consider a lack of rationality.²⁷⁵

Slobogin criticises the need for a test of insanity based on rationality,²⁷⁶ commenting that in the same way compulsion cannot be measured neither can rationality.

However, while a compulsion test can be subsumed into a rationality test, we cannot abandon a rationality test simply because we are ignorant of how to measure rationality. If rationality is the basis of criminal responsibility, there can be no

²⁷¹ Ibid., 175

²⁷² See Chapter 1.

²⁷³ See e.g. Lord Simon's comment in *Lynch* [1975] 1 All ER 913 at 933-4.

²⁷⁴ Mackay, above n.208, 79.

²⁷⁵ See under 3.2.1, below.

²⁷⁶ Slobogin, "An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases" (2000), 34.

justification for holding an irrational individual blameworthy. Reliance must be placed on medical expertise for a description of the defendant's condition.

2.3.4. Summary

In constructing an insanity defence, the question should not be about the individual's cognition, but about his culpability based on his rationality which must establish whether he may be held a responsible agent. Moore writes²⁷⁷ that "the legal definition of [insanity] should embody those moral principles that underlie the intuitive judgment that mentally ill human beings are not responsible." Only an individual who is rational can be a moral agent. Only a moral agent can be responsible in law.

3. The Insanity Defence in the UK

According to the *M'Naghten* Rules,²⁷⁸ an individual who is able to show on a balance of probabilities that, at the time of committing a criminal offence, he was suffering from a defect of reason due to a disease of the mind as to not know the nature and quality of his act or that it is wrong, will be afforded a defence of insanity. The narrow legal definition of insanity differs substantially from medical definitions: there will be many occasions where an individual who is medically insane may not be entitled to rely upon a defence of insanity, while it is possible for an individual who is medically sane to successfully assert the defence. Equally, there will be occasions where a defendant is not sufficiently rational at the time of committing an offence, yet

²⁷⁷ Moore, above n.266, 244.

²⁷⁸ (1843) 10 Cl & Fin 200. These Rules were accepted by the House of Lords in *Sullivan* [1983] 2 All ER 673 to have provided a comprehensive definition of insanity since 1843.

will be held criminally responsible with no possibility of recourse to any defence.

3.1 The Substantive Law

3.1.1 Disease of the mind

Lord Denning in *Bratty v Attorney General for Northern Ireland*²⁷⁹ described a disease of the mind as “any mental disorder that manifests itself in violence and is prone to recur”. While the term ‘disease of the mind’ covers the range of mental illnesses,²⁸⁰ the defence now incorporates many other conditions which include epilepsy,²⁸¹ diabetes,²⁸² arteriosclerosis²⁸³ and sleepwalking.²⁸⁴ Any condition which is identified by the courts as a disease of the mind falls now within the scope of the insanity defence. There need be no degeneration of the brain as a consequence of the disease of the mind.²⁸⁵ There appears to be no compelling rationale for the inclusion of such conditions within this defence, save that the cause is internal. This reasoning emerged from the Court of Appeal case of *Quick*,²⁸⁶ in which Lawton LJ chose to qualify Lord Denning’s statement in *Bratty* by adding that a malfunctioning of the mind of transitory effect cannot be a disease of the mind where it is caused by an external factor.²⁸⁷ Williams criticised²⁸⁸ this exception to Lord Denning’s rule querying whether this was necessary in order to avoid an insanity defence for Quick, as Lawton LJ had assumed to be the case. There is no reason to believe that where a diabetic becomes hypoglycaemic through an injection of insulin the condition will

²⁷⁹ [1963] AC 386, 412.

²⁸⁰ The defence is used most frequently in relation to schizophrenia: Mackay and Kearns, above n.196, 716.

²⁸¹ *Sullivan* [1983] 2 All ER 673.

²⁸² *Hennessy* [1989] 2 All ER 9; *Bingham* [1991] *Crim LR* 433.

²⁸³ *Kemp* [1957] 1 QB 399.

²⁸⁴ *Burgess* [1991] 2 QB 92.

²⁸⁵ *Sullivan* [1983]; *Kemp* [1957].

²⁸⁶ [1973] QB 910, 922.

²⁸⁷ Such as violence, drugs, including anaesthetics, alcohol and hypnotic influences.

²⁸⁸ Above n.233, 671.

recur or, if it does, that it will result in violence. This should take the condition outside of Lord Denning's definition of disease of the mind.

However the rule in *Quick* was accepted by the House of Lords in *Sullivan* and approved by the Supreme Court of Canada in *Rabey*.²⁸⁹ In *Rabey*, the court held that the defendant's violent reaction to a rejection by a woman whom he admired was so abnormal and extreme that its cause was due to an internal factor triggered by rejection but held, *obiter*, that extreme traumatic events might allow a defence of automatism where they are sufficient to trigger a state of disassociation in normal people. This distinction was recognised at trial in *Re T*²⁹⁰ where the defendant who had been raped three days before taking part in a robbery was allowed to plead a defence of automatism.

3.1.2. *The Internal/External Dichotomy and Absence of Mens Rea*

There is a likelihood and a danger, not only in the case of the mentally ill, but also in the case, for example of a diabetic or epileptic who has killed and claims not to have known of the nature and quality of his act, that this will discharge the prosecution from the need to show any *mens rea*. In fact, this danger has been confirmed in relation to both limbs of the Rules in *A-G's Reference (No 3 of 1998)*²⁹¹ in which the Court of Appeal held that where insanity is assumed the Crown need prove only the *actus reus* of the offence.²⁹² This decision is consistent with the House of Lords'

²⁸⁹ (1980) 114 DLR (3d) 193.

²⁹⁰ [1990] *Crim LR* 256.

²⁹¹ [1999] 3 All ER 40.

²⁹² This case gives an interpretation of s2(1) of the Trial of Lunatics Act 1883 which provides that where insanity is proved, the special verdict will follow if the jury is satisfied the defendant did the act or omission. At trial, the judge had felt bound by the ruling in *Egan* [1998] 1 Cr App R 121 (now treated as *per incuriam* since the House of Lords decision in *Antoine* [2000] 2 All ER 208) to rule that the prosecution must also show *mens rea*. See All ER Annual Review 1999, 123.

decision in *Antoine*²⁹³ concerning fitness to plead²⁹⁴ in which it was held that, contrary to *Egan*,²⁹⁵ for the purpose of s4A of the Criminal Procedure (Insanity) Act 1964, as substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, a jury need only determine whether the defendant committed the act or omission charged against him, with no requirement to consider any mental element. Curiously, Lord Hutton in *Antoine* was prepared to allow a jury to consider mistake, accident or self-defence as negating the 'act', all of which can be described as defences due to lack of *mens rea*.²⁹⁶

As a result of these decisions, the defendant who has killed and is able to satisfy the insanity defence will have no consideration of his *mens rea* at trial, even if he relies upon the second limb of the *M'Naghten* Rules, and may become subject to the special verdict to a charge of murder, where a charge of voluntary manslaughter may have been more appropriate. The outcome would be to compel an indefinite hospital order which could bring us into breach of the Human Rights Act 1998 and direct conflict with the ECHR.²⁹⁷ Aside from such conflict, it cannot be right to claim that insanity is a true defence where it operates to discharge the prosecution from part of its duty. The prosecution should be compelled to prove both *actus reus* and *mens rea* and should there be failure of proof, the defendant should be acquitted.

The disadvantage of taking this purist route is that dangerous individuals who do not meet the treatability requirement of the Mental Health Act 1983 may go free.

²⁹³ [2000] 2 All ER 208

²⁹⁴ See Chapter 1, 2.4 above.

²⁹⁵ [1998] 1 Cr App R 121.

²⁹⁶ See case comment: [2000] *Crim LR* 621, 624.

²⁹⁷ Sutherland and Gearty, "Insanity and the European Court of Human Rights" [1992] *Crim LR* 418 at 420. See below under 3.2.

However, it is likely that such a difficulty will be overcome by the introduction of the new Mental Health Act with its reduced treatability requirement,²⁹⁸ which will allow for the civil detention of the severely personality disordered.

The internal/external dichotomy which originated from *Quick* needs to be addressed. While it may be suggested²⁹⁹ that the division allows the courts to distinguish between those in need of treatment and those who are not, it would be inaccurate to claim that all of those individuals falling within the insanity defence are in need of treatment or continue to pose a risk. It is also possible that the stark division between internal and external factors may be ignored in practice.³⁰⁰ Since the introduction of the 1991 Act, there may be no longer such a compelling reason to avoid an insanity plea, although no doubt the stigma will continue to operate as a deterrent. Whatever replacement is ultimately found for the present insanity defence, as Mackay writes,³⁰¹ “one is forced to accept that the defence of insanity in England will continue to remain a rarely used but legally discredited mechanism of last resort.”

3.1.3. Defect of Reason

While the term ‘disease of the mind’ has been afforded a wide interpretation, ‘defect of reason’, along with the knowledge requirements under the *M’Naghten* Rules, has been given a narrow interpretation, so as to exclude ‘the vast majority of mentally disordered persons from the realms of the insanity defence.’³⁰² The defect of mind

²⁹⁸ White Paper, *Reforming the Mental Health Act, Part I, The New Legal Framework*, Cm. 50161 (2000), para 3.18. See Chapter 2 above, at 2.2.

²⁹⁹ Baker, “Human Rights, M’Naghten and the 1991 Act” [1994] *Crim LR* 84, 89.

³⁰⁰ As occurred in *McFarlane*, *Guardian*, 11th September 1990, 3.

³⁰¹ Mackay, above n.208, 143.

³⁰² *Ibid.*, 100.

must be “enough to make the act irrational and therefore to deny responsibility in law”.³⁰³ Acts done out of “brutish stupidity” will not suffice.

There must be a causal relationship between the defect of reason and the disease of the mind. This nexus becomes significant in considering cases of somnambulism. Mackay refers³⁰⁴ to the Canadian case of *Parks*,³⁰⁵ in which the defendant was acquitted on the grounds of automatism caused by sleepwalking. Although the court described somnambulism as an abnormal condition, this was not considered to be the cause of the impairment. As the defect of reason could only be traced back to sleep rather than sleepwalking, there was no causal connection. La Forest J compared the combination of sleep deprivation, stress and sudden noises in the night to the effect of concussion on a waking person, blurring the distinction between internal and external factors. This suggests that somnambulism brought on by such factors may lead to a defence of automatism while if the condition were to be induced by a disease, of which somnambulism was a symptom, the defence may still be insanity.

However, this line of reasoning was rejected by the Court of Appeal in *Burgess*³⁰⁶ where it was held that a transitory abnormality or disorder caused by an internal factor, whether functional or organic, which manifested itself in violence amounted to insanity even where a likelihood of repetition of the violence was rare. Lord Lane CJ commented on *Parks* that while sleep is a normal condition, sleepwalking is not.³⁰⁷ Medical evidence in this case described somnambulism as a pathological condition.

³⁰³ *Kemp* [1957] 1 QB 399, 406.

³⁰⁴ Mackay, above n.208, 47-49.

³⁰⁵ Ontario Court of Appeal, (1990) 78 CR (3d) 1, upheld by the Supreme Court of Canada, (1992) 95 DLR (4th) 27.

³⁰⁶ [1991] 2 All ER 769.

³⁰⁷ *Ibid.*, 775.

Since pathology is the science of diseases, Lord Lane CJ commented that “in this respect at least there is some similarity between the law and medicine”.³⁰⁸ Given that somnambulism appears to be on the borderline of normal/abnormal conditions, which may assist in explaining the two contradictory authorities, it is difficult to envisage another internal condition which, in this country, would break the causal nexus between defect of reason and disease of the mind.

3.1.4. ‘Nature and Quality of the Act’ and ‘Knowledge that the Act is Wrong’

The defect of reason must lead the defendant either not to know the nature and quality of his act or that it is wrong. This is a narrow test of mental capacity. An individual who cuts his victim’s throat believing he is slicing a loaf of bread will satisfy this part of the definition. Such an error which could not be explained by mental illness normally would lead to a failure by the prosecution to establish *mens rea*.³⁰⁹ Where it can be explained by a disease of the mind, the defendant will be subjected to the risk of detention, by virtue of the Special Verdict. However, an individual who commits an offence while suffering from an irresistible impulse will not fall within the insanity defence.³¹⁰

Williams is critical of the view that even if an insane person knows he is killing, he might not have any real appreciation or understanding of his act, countering that even a sane individual cannot be “credited with the transcendental insight of the mystic.”³¹¹

³⁰⁸ [1991] 2 All ER 769, 776.

³⁰⁹ See 3.1.2 above.

³¹⁰ *Kopsch* (1925) 19 Cr App Rep 50.

³¹¹ Williams, above n.235, 491-492.

It has been suggested that the word 'know' is not as easy to interpret as 'appreciate' or 'understand'.³¹²

Knowledge that the act is wrong requires knowledge only that it is legally wrong.³¹³

While ignorance of the law will not normally excuse, it may be that this rule applies to those individuals who are capable of knowing what is right,³¹⁴ since the insane individual who does not know that his act is illegal will be excused by virtue of the *M'Naghten* Rules. Alternative views that the defendant need only fail to believe that his act is morally wrong even if he is aware that it is against the law are wrong.³¹⁵

Despite this, it appears that expert witnesses tend to follow the latter interpretation of the *M'Naghten* Rules,³¹⁶ where the Rules are followed by them at all. It is apparent from the research conducted by Mackay and Kearns that expert witnesses may be assessing this limb on the basis of a defendant's culpability rather than on a strict interpretation of the Rules and this may have the indirect effect of expanding the *M'Naghten* Rules. Such a development of the Rules may be correct, since Williams suggests³¹⁷ it would be unfair to punish a woman who killed her children, thinking she was saving them from torture. Under the strict interpretation of the Rules, she would be punished.

An individual suffering from insane delusions is likely to fall outside of the scope of the insanity defence where, for example, he believes he is acting on divine authority but still recognises what he is doing is against the law. Yet, the most likely defendant

³¹² Fingarette, above n.203, 146.

³¹³ *Windle* [1952] 2 QB 826.

³¹⁴ Williams, above n.235, 495.

³¹⁵ *Stapleton* (1952) 86 CLR 358.

³¹⁶ Mackay and Kearns, above n.196, 723.

³¹⁷ Williams, above n.235, 494.

in insanity trials is the one who recognises cognitively what he is doing and yet goes on, for example, to kill.³¹⁸

3.1.5. Summary of M'Naghten Rules in the Light of Theoretical Considerations

Out of cognition, volition and affect (moods or emotions), the *M'Naghten* Rules only deal with cognition.³¹⁹ The Rules also exclude impairments of practical reasoning, such as those produced by a psychotic disorder.³²⁰ Since the common perception, as discussed above, is that minimal rationality is required as a condition of moral and legal responsibility,³²¹ it can be seen that the Rules are grossly lacking in this respect. There are many conditions which may cause an individual to be irrational but he may still know what he is doing and that it is a crime. Given that irrationality may be described not as a failure in moral judgment, but a failure in capacity for moral judgment,³²² the *M'Naghten* Rules are concerned more with a failure in judgment than in capacity.

The *M'Naghten* Rules do not focus on a lack of capacity. They focus on the defendant not knowing the nature and quality of his act or that it was wrong. The question ought not to be whether the defendant's mental condition caused his actions but whether it prevented him from having the capacity to choose rationally his actions.³²³ The key is not what caused the defendant to act, but what caused him to lack capacity to be held a responsible agent.

³¹⁸ Fingarette and Hasse, above n.223, 29.

³¹⁹ Fingarette, above n.203, 144.

³²⁰ Fulford, "Value, Action, Mental Illness, and the Law", in *Action and Value in the Criminal Law*, Eds. Shute, Gardner and Horder, (1993), 300-310.

³²¹ Morse, above n.218, 782; Fingarette, above n.203, 132.

³²² Fingarette and Hasse, above n.223, 39-40.

³²³ Mackay, above n.208, 87.

The boundary between rationality and irrationality should be determined by a jury, not medical experts, who should only be entitled to comment on the defendant's medical condition. Most significantly, use of the phrase 'disease of the mind' not only carries with it a social stigma but also encourages medical experts to interpret the Rules in medical, rather than legal terms. An 'aberration of normal mental functioning', for example, offers a more neutral term from which a jury would be entitled to draw its own conclusions.

3.2. Procedural Requirements and Human Rights

Since the implementation of the Human Rights Act 1998 all UK legislation passed before or after its implementation must be read and given effect in a manner which is compatible with the European Convention on Human Rights.³²⁴ The Act, which lists the Articles and Protocols of the Convention in s1(1) and Schedule 1, thereby creating "Convention Rights" in English domestic law, will have the most effect on rules of evidence and procedure in criminal law, rather than the substantive criminal law.³²⁵ Even with regard to the need for certainty of law, while it can be said that a law must be "formulated with sufficient precision to enable the citizen to regulate his conduct",³²⁶ such formulation need not be in statute,³²⁷ and applies to criminal offences rather than the defences. It appears then that the definition of the insanity defence, although defined only at common law, will avoid conflict with the ECHR.

³²⁴ S3.

³²⁵ Buxton, "The Human Rights Act and the Substantive Criminal Law" [2000] *Crim LR* 331.

³²⁶ Article 8: *Silver v UK* (1983) 5 EHRR 347 [87]-[88].

³²⁷ See e.g. common law breach of the peace, *Steel v UK* [1988] *Crim LR* 893, which passes the *Silver* test.

However, there may be greater conflict in the area of evidence.³²⁸ Early decisions following the implementation of the Human Rights Act indicate that the UK Government has been in breach of article 6 with regard to the right to silence.³²⁹ The European Court of Human Rights has emphasised the limited nature of making an adverse interference from an accused's silence³³⁰ and the Court of Appeal³³¹ in *Condon* has been prepared to give a broad interpretation to the 'safety' test on reviewing convictions.³³² However, such an expansive view of the ECHR has not been taken by the House of Lords in respect of the burden of proof in diminished responsibility.³³³ The same may be the case for the insanity defence.

The burden is on the defendant to prove he is entitled to the defence on a balance of probabilities. It is, as yet, unresolved as to whether, following the implementation of the Human Rights Act 1998, this will contravene Article 6(2) ECHR which raises a presumption of innocence. The Divisional Court's decision in *Kebilene*³³⁴ suggested that the burden may have to become evidential only, bringing the procedural requirements in line with the defence of automatism.

In *Kebilene*³³⁵ the Divisional Court, allowing for judicial review of a decision by the Director of Public Prosecutions to consent to prosecution, upheld the trial judge's ruling that sections 16A and 16B, as inserted in the Prevention of Terrorism

³²⁸ See Jennings, Ashworth and Emmerson, "Silence and Safety: The Impact of Human Rights Law" [2000] *Crim LR* 879.

³²⁹ *Condon v UK* [2000] *Crim LR* 679.

³³⁰ *Averill v UK* [2000] *Crim LR* 680.

³³¹ [1997] 1 Cr App R 185.

³³² Since s2(1) Criminal Appeal Act 1968, as amended by Criminal Appeal Act 1995, the one criterion for reviewing a conviction is that it is unsafe.

³³³ *Lambert* [2001] 3 All ER 577, discussed below.

³³⁴ [1999] 3 WLR 175.

³³⁵ *Ibid.*

(Temporary Provisions) Act 1989, were incompatible with article 6(2) ECHR, which guaranteed the presumption of innocence. The offence of s16A concerns the possession of articles for terrorist purposes.³³⁶ Neither the possession nor the terrorist purposes need to be proved beyond reasonable doubt. Subsection (4) places a reverse burden of proof on the defendant and so “[a] defendant who chooses not to give or call evidence may be convicted by virtue of presumptions against him and on reasonable suspicion falling short of proof.”³³⁷ Both sections were found to “undermine, in a blatant and obvious way, the presumption of innocence”,³³⁸ and contravened Article 6(2).

However, the House of Lords³³⁹ unanimously overturned the Divisional Court’s decision. The decision regarding article 6(2) was taken at too premature a stage. Lord Steyn added that issues as to the interpretation and compatibility of s16A of the 1989 Act and article 6(2) are “arguable” but that it would be wrong to express views on those issues: “[t]he effect is that those issues are undecided and entirely open at all levels in the criminal proceedings.”³⁴⁰ Lord Hope mentioned that the defence of insanity is the only exception to the presumption of innocence recognised by the common law, but pointed out that the reason for this is that “[t]he presumption is one of sanity, not responsibility”.³⁴¹ He also considered that article 6(2) “is not regarded as imposing an absolute prohibition on reverse onus clauses, whether they be evidential (presumptions of fact) or persuasive (presumptions of law).”³⁴²

³³⁶ Section 16B contains similar provisions.

³³⁷ [1999] 3 WLR 175, 190 per Lord Bingham CJ.

³³⁸ *Ibid.*, 190.

³³⁹ (2000) 2 AC 326.

³⁴⁰ *Ibid.*, 372.

³⁴¹ *Ibid.*, 377.

³⁴² *Ibid.*, 385.

J.C. Smith commented on the House of Lords decision that deciding each case on its merits wherever there is a reverse onus provision would lead to “a long period of uncertainty and a vast amount of expensive and wasteful litigation”.³⁴³ He suggested that the Government should follow the recommendation of the CLRC in its Eleventh Report³⁴⁴ by converting all reverse onus decisions “into evidential burdens only”.³⁴⁵

Since *Kebilene*, the Court of Appeal has held in *Lambert, Ali and Jordan*³⁴⁶ that the defendant’s burden of establishing a defence of diminished responsibility on a balance of probabilities was less objectionable than placing a burden on the defendant to prove an essential element of an offence,³⁴⁷ since a defendant who did not seek to rely on diminished responsibility would not have to prove anything in relation to the actual offence. In balancing the competing interests involved, a degree of deference must be paid to the intentions of Parliament,³⁴⁸ and therefore section 2 of the Homicide Act 1957 was not incompatible with article 6. Subsequently, the House of Lords in *Lambert*³⁴⁹ took a more sceptical view of probative burdens, commenting that legislative interference with the presumption of innocence “requires justification and must not be greater than is necessary”, taking into account the principle of proportionality.³⁵⁰

As no mention was made of the defence of diminished responsibility by the House of Lords in *Lambert*, it remains unclear whether the burdens of proof in insanity and

³⁴³ [1999] *Crim LR* 994, 997.

³⁴⁴ *Evidence (General)* Cmnd 4991, (1971), para. 140.

³⁴⁵ Now contained in clause 8 of the CLRC’s draft Bill.

³⁴⁶ [2001] 1 All ER 1014.

³⁴⁷ *Ibid.*, 1022.

³⁴⁸ *Ibid.*, 1022.

³⁴⁹ [2001] 3 All ER 577.

³⁵⁰ *Ibid.*, *per* Lord Steyn, 590.

diminished responsibility will conflict with the ECHR. However, Jennings, Ashworth and Emmerson suggest that as a result of the Human Rights Act justice must now not only be done, but also be seen to be done.³⁵¹ This could mean a shift to an evidential burden only in these defences. While removal of the presumption of sanity would place an unreasonable burden on the prosecution, it is submitted that the suggestion of J.C. Smith and the CLRC that the defendant's burden should be evidential would accord more closely with article 6(2) and better protect those individuals who are not deserving of blame and punishment. Granted there must be a balance between the rights of the individual and the safety of the public. However, in the case of the insanity defence, public safety would not be compromised by reducing the burden on the defendant who will be subject in any event to disposal consequences should his defence succeed. In *Salabiaku v France*³⁵² the European Court held that under article 6(2) states must confine presumptions of fact or law within reasonable limits, taking into account the importance of what is at stake. What is at stake with this reverse onus is potentially the difference between punishment and treatment.

The effect of the special verdict also could bring the UK into conflict with the ECHR. Article 5(1)(e) of the European Convention on Human Rights provides for the detention of persons of unsound mind. From the leading case of *Winterwerp v Netherlands*³⁵³ three requirements must be satisfied. The mental disorder must be such as warrants compulsory confinement, there must be a close correspondence between the definition of the mental disorder and expert medical evidence and the court's decision must be based on objective medical expertise. Three areas of potential

³⁵¹ Jennings, Ashworth and Emmerson, above n.328, 894.

³⁵² (1988) 13 EHRR 379 [28].

³⁵³ (1979) 2 EHRR 387.

conflict emerge. The definition of mental disorder stems from a test formulated in 1843 and which has been extended to include sleepwalking, hyperglycaemia and epilepsy. Secondly, the medical expertise required under section one of the Criminal Procedure (Insanity and Fitness to Plead) Act 1991 may not be attributed sufficient importance.³⁵⁴ Finally, although the Criminal Procedure (Insanity and Fitness to Plead) Act 1991 abolished the mandatory indefinite hospitalisation requirement for the majority of offences,³⁵⁵ it was retained for murder.³⁵⁶ The mandatory detention where the special verdict is returned on a murder charge does not allow for objective medical expertise and could result in, for example, a diabetic who kills being made subject to such an order. It seems likely that successful challenges could be made in this respect to the special verdict under the Human Rights Act 1998.

3.2.1. Expert Witnesses

Expert witnesses in insanity cases may comment only on the facts of the defendant's condition. The judge decides whether there is a defect of reason due to a disease of the mind. The jury makes a factual finding of NGRI. In practice, medical experts are prone to comment on the defendant's mental illness and its relationship to the insanity defence.³⁵⁷ In so doing, they can be described as acting as a 'thirteenth juror.'³⁵⁸

The danger of over-involvement by the medical profession with the defence of insanity is that the two distinctive disciplines of law and psychiatry are not easily

³⁵⁴ Baker, above n.299.

³⁵⁵ The court now has a choice, *inter alia*, of making a guardianship order under the Mental Health Act 1983, a supervision or treatment order or an order for an absolute discharge.

³⁵⁶ It is not surprising that the insanity defence was used to a charge of murder on only four occasions between 1991-1996, given the availability of diminished responsibility as an alternative defence.

³⁵⁷ Mackay, above n.208, 104.

³⁵⁸ Morse, above n.218, 823.

compatible. The former must deal with concepts of rationality while the latter must deal with the various diseases of insanity. "Psychiatry ... is inherently deterministic ... while law normally assumes freedom of choice."³⁵⁹

It may be preferable for medical experts not to be involved in legal decision making.³⁶⁰ Clearly, their opinions as to whether an individual is medically insane would not be relevant in cases involving epilepsy, etc. They may also be unable to apply their expertise to the legal principles concerned.

4. Reform

4.1. Existing and Proposed Definitions

4.1.1. The Insanity Defence Abroad

The product test which originated from a New Hampshire case³⁶¹ in 1869 was introduced into the District of Columbia in 1954 in the case of *Durham v US*³⁶² as follows: "It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."³⁶³ This decision reflected a discontent with the *M'Naghten* Rules and was hailed by some as a major breakthrough in the development of the insanity defence.³⁶⁴ However, the *Durham Rule* was abandoned in 1972. Judge Bazelon, who had taken part in the *Durham* decision, found that the product test had not taken away the issue of criminal

³⁵⁹ Fulford, above n.320, 279.

³⁶⁰ See 4.1.4 below.

³⁶¹ *State of New Hampshire v Pike* 49 NH 399 (1869).

³⁶² 214 F 2d 847 (DC Cir 1954).

³⁶³ *Ibid.*, 874-875.

³⁶⁴ Moore, above n.266, 228.

responsibility from the medical experts which left the jury in no better a position to make a moral judgment than with the *M'Naghten* Rules.³⁶⁵

The American Law Institute's test of insanity is worded as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."³⁶⁶ Until the Hinkley trial, this test was adopted in some form by all of the federal courts of appeals and many states.³⁶⁷

Provoked by the Not Guilty by Reason of Insanity (NGRI) verdict of Hinkley for the attempted assassination of President Reagan there was an outcry against the insanity defence, the consequence of which resulted in five major groups of change across the United States.³⁶⁸

1) Some states opted to change the test of insanity:

The trend for those who have changed the test has been to move away from the ALI test and any form of volitional test. This has resulted in a re-emergence of the *M'Naghten* Rules.³⁶⁹

2) Some states enacted a verdict of Guilty But Mentally Ill (GBMI):

The GBMI verdict was enacted by some states as a response to the Hinkley verdict and its merits are discussed below.

³⁶⁵ Bazelon, "Psychiatrists and the Adversary Process", *Scientific American* 230 (1974), cited in the Butler Report, para. 18.15.

³⁶⁶ The American Law Institute, *Model Penal Code, Proposed Official Draft* (1962) s4.01(1), 66, cited in Mackay, above n.208, 111.

³⁶⁷ Moore, above n.266, 220.

³⁶⁸ Mackay, above n.208, 113.

³⁶⁹ *Ibid.*, 113-117.

3) Some states changed the rules of evidence:

The prosecution in the Hinkley trial had to prove the defendant was sane beyond reasonable doubt. This was thought to be a major factor in the outcome of the trial.

Now, two thirds of states which have retained the insanity defence place the burden of proof on the defendant on a preponderance of evidence.³⁷⁰

4) Others changed the disposal consequences:

The tightening up of disposal consequences has been the most prevalent response to the Hinkley verdict. Two cases are worthy of note. In *Jones v US*³⁷¹ a defendant was committed to hospital as a consequence of the NGRI verdict. The issue which came before the Supreme Court was the constitutionality of detaining Jones beyond the maximum term of the offence for which he was acquitted. The Supreme Court found that Jones could continue to be detained without any need for a finding that he remained dangerous and mentally ill. The burden was on Jones to prove an absence of these factors. However, in *Foucha v Louisiana*³⁷² the Supreme Court has found that an individual cannot continue to be detained on the grounds of his dangerousness alone. There must be a continuing mental illness.

5) Some opted to abolish the defence:

Several states have opted for partial or total abolition of the insanity defence since the Hinkley verdict.³⁷³

Only the *Durham* and New Hampshire tests of insanity attempt to link legal insanity and mental illness. With the other tests, mental illness forms only one part of the

³⁷⁰ Ibid., 117-118

³⁷¹ 463 US 354 (1983).

³⁷² 112 S Ct 1780 (1992).

³⁷³ Abolition is discussed in more detail below at 4.1.6.

test.³⁷⁴ Moore suggests that the reason for this was the need to fit a test for legal insanity into a similar template to other excusing conditions, i.e. that of non-culpable ignorance or compulsion.³⁷⁵ Hence, all other insanity tests either excuse due to the ignorance of the mentally ill individual or due to his being compelled to act. In the case of the *M'Naghten* Rules, the former category clearly applies. The knowledge required of the defendant relates to a mistake as to some fact or law.³⁷⁶ Moore points out that it is wrong to categorise the insanity defence in this way. This may be correct but Moore then argues that insanity is a status rather than an excuse. For reasons discussed above,³⁷⁷ such a general classification of insanity is not acceptable. Irrationality is not a constant factor in many insane individuals. Only certain severely and permanently mentally ill individuals, such as those suffering from a severe subnormality, ought to be entitled to benefit from such an exemption. Those suffering from a severe mental illness *at a point in time* should still satisfy a test of insanity, rather than claim a blanket exemption on account of their status.

However, Moore's criticisms remain valid: "[p]eople are not responsible because they are crazy, not because they always lack intentions, are ignorant, or are compelled."³⁷⁸

As discussed above, the insanity defence should represent a lack of a capacity to choose resulting from irrationality.³⁷⁹ While the product test in *Durham* failed to dissociate itself from the interpretation of medical experts, the link between the mental illness and insanity defence has much to be commended. Were such a link to

³⁷⁴ Moore, above n.266, 220.

³⁷⁵ Ibid., 220.

³⁷⁶ Ibid., 221. However, a sane defendant would not be entitled to plead a defence due to ignorance of the law.

³⁷⁷ See 2.1.2 above.

³⁷⁸ Moore, above n.266, 223.

³⁷⁹ See 2.3.3.

be made between *irrationality* and the defence of insanity, more just decisions, properly considered by juries, may result.

4.1.2. Causality

The Butler Committee proposed a new verdict of not guilty on evidence of mental disorder³⁸⁰ which should be available where mental disorder negates *mens rea* and in all cases where the defendant is suffering from severe mental illness or abnormality.

The Law Commission has proposed that an element of causality be retained.³⁸¹

Mackay suggests³⁸² that removing the causality would give too much power to medical expertise which, in turn, would take us further away from notions of causality. This may reflect what happened in America with the product test in *Durham*. Now contained in clause 35(2) of the Draft Criminal Code, it is allowed for the prosecution to show that the offence was not attributable to the disorder. While it may be advisable to allow a blanket exemption for those exceptionally few individuals who are permanently incapable of being moral agents, such an exemption ought not to be based on a medical definition pertaining to the severely mentally ill. It should be based on the permanent inability to engage in a moral dialogue.³⁸³ A 'severe and permanent mental condition' could be defined as 'a severe mental condition which has endured from childhood, (or as a result of brain damage induced by serious illness or accident) from which there is no prospect of recovery.' It would incorporate predominantly those individuals suffering from the more severe organic illnesses listed under the ICD10 classification of mental and behavioural disorders,³⁸⁴ such as

³⁸⁰ Above n.205, para. 18.18.

³⁸¹ *A Criminal Code for England and Wales*, Law Commission No. 177 (1989) Vol. 2, para.11.16.

³⁸² Mackay, above n.208, 90.

³⁸³ See Chapter 1, 2.5.

³⁸⁴ World Health Organisation, *The ICD10 classification of mental and behavioural disorders: clinical descriptions and diagnostic guidelines*, (1992), F00-F09, the organic mental disorders.

dementia in Alzheimer's disease, dementia in Creutzfeldt-Jakob disease and mental disorder due to brain damage and dysfunction and to physical disease. Severe mental retardation and profound mental retardation³⁸⁵ would also be included.

4.1.3. Social Stigma

Reform suggested by the Butler Committee may have the effect of removing the stigma and widening availability of the defence for the severely mentally ill. What its proposals do not completely achieve is the removal of the stigma of a mental illness defence. It is debatable whether this could ever be achieved although it is certainly desirable that the term insanity be substituted for a less emotive phrase. Mackay suggests³⁸⁶ a not guilty verdict based on "an aberration of normal mental functioning present at the time of the commission of the alleged offence." This view supports the opinion of Williams³⁸⁷ who also uses the term 'mental aberration'. The effect of such a type of verdict would be to allow for a demedicalised term, where the condition has to be present at the time of the offence but may be transitory.

4.1.4. Medical Evidence

It may not be preferable to encourage greater compatibility between the *M'Naghten* Rules and the Mental Health Act, since the former ought to be directed at a denial of criminal responsibility, and the latter at the treatment of those suffering from serious mental disorders.³⁸⁸ In proposing a new defence, the Butler Committee sought to avoid the use of medical terms and allow psychiatrists to state facts without deciding

³⁸⁵ F72 and F72.

³⁸⁶ Mackay, above n.208, 140.

³⁸⁷ Williams, above n.235, 445.

³⁸⁸ Baker, above n.299, 88.

on responsibility which is a legal term.³⁸⁹ Williams suggests³⁹⁰ that the term 'insanity' is used in court to mean both mental derangement and legal irresponsibility, thus creating difficulty for juries in separating the legal term from the medical. Moore suggests³⁹¹ it would be 'pure coincidence' if the medical definition of mental illness turned out to be the same as the condition which excuses defendants from responsibility. The need to separate medical terms from legal definitions is echoed by Morse³⁹² who recommends reforming the role of medical experts by asking them the right questions. If medical experts are restricted to providing a clear, clinical description of facts, the scope for dispute between experts on opposing sides will be reduced greatly. Fulford suggests³⁹³ there is a need for recognition of the dividing line between the expert's role as a fact provider and the role of the jury in making value judgments.

4.1.5. Guilty But Mentally Ill (GBMI)

The GBMI verdict has little to offer the debate on the insanity defence. It may ensure treatment is made available to the mentally ill defendant, but a jury verdict is probably not the best means of doing so, since treatment will be made available where necessary in any event. To use Morse's example, "[i]s the verdict 'guilty but herpes' sensible or necessary to ensure the medical treatment of inmates suffering from herpes?"³⁹⁴

³⁸⁹ Above n.205, para. 18.17.

³⁹⁰ Williams, above n.235, 446.

³⁹¹ Moore, above n.266, 227.

³⁹² Morse, above n.218, 821.

³⁹³ Fulford, above n.320, 305.

³⁹⁴ Morse, above n.218, 804.

More significantly, if the mentally ill are to be described as nonresponsible agents, then it is inappropriate to attribute culpability in the form of a guilty verdict under such circumstances.³⁹⁵ The Disability of Mind doctrine proposed by Fingarette and Hasse is flawed perhaps by it leading to a verdict of "Guilty of _____, with Nonculpable Disability of Mind".³⁹⁶ While the doctrine recognises a lack of culpability, this recognition does not transfer to a lack of guilt. While it is possible to employ the term 'guilt' to illustrate merely that the necessary elements of the offence were present,³⁹⁷ the word suggests more than a mere presence of *actus reus* and *mens rea*. It also suggests responsibility for the commission of the offence. Given that Fingarette and Hasse later suggest that the maxim for the Disability of Mind doctrine is, "Where there is no *mens* there can be no *mens rea*,"³⁹⁸ it does not seem possible that any individual could be entitled to use their suggested verdict since, to have a 'nonculpable disability of mind' would mean the defendant was lacking '*mens*' and thus could not have satisfied both elements of the offence in order to be found guilty.

4.1.6. Abolition

Abolition of the insanity defence, either partial or complete, is difficult to justify.³⁹⁹ With a complete abolition, either it must be argued that no defendant is insane at the time he acts and all defendants must therefore be punished, or that all insane defendants will be lacking either the *actus reus* or the offence (due to lack of voluntariness) or the *mens rea* (due to lack of foresight) in order to escape conviction. The former assertion will be impossible to prove. The latter, it is submitted, is

³⁹⁵ Ibid., 804.

³⁹⁶ Fingarette and Hasse, above n.223, 67.

³⁹⁷ Ibid., 67.

³⁹⁸ Ibid., 200. The verdict of Guilty of _____, with Nonculpable Disability of Mind is discussed below at 4.2.3. The rationale behind the defence is not rejected. The criticisms made above relate only to the ascription of guilt.

³⁹⁹ Morse, above n.218, 780.

inadequate in place of the full insanity defence. One objection to the abolition of the insanity defence is that few insane defendants will act as automatons due to mental illness or disorder. Their acts are still willed and, in the strictest sense, voluntary. Thus, the *actus reus* of the offence still will be possible to prove. Another objection to this option is that most mentally disordered individuals will be capable of forming the *mens rea* at the time of the offence.⁴⁰⁰ Further, if we are able to say that an individual who suffers from a mental disorder is not responsible and therefore is not a moral agent, it is inaccurate and artificial to describe such an individual as lacking *mens rea*. An absence of responsibility ought to precede consideration of any of the elements of an offence.

The only remaining argument in defence of abolition must be that it is justifiable to punish where there is no blame, an argument which is contrary to our system of criminal justice where *mala in se* crimes are concerned. Alongside the precondition of just desert for punishment in respect of such stigmatic offences lies the requirement that the actor be a moral agent. Responsibility may not be attributed to an actor who is not a moral agent.⁴⁰¹ While this continues to be the case, the insanity defence must be retained and this should be so regardless of how few defendants are able or choose to rely on it.

Slobogin proposes “an intermediate position”,⁴⁰² a partial abolition of the defence which allows the defendant to rely upon his mental disorder in support of his claim for

⁴⁰⁰ Ibid., 801-802.

⁴⁰¹ See, *inter alia*, Morse, above n.218, 781.

⁴⁰² Slobogin, above n.276, 1.

a defence of duress, self-defence⁴⁰³ or absence of *mens rea*.⁴⁰⁴ So, for example, a defendant who, due to his mental disorder, mistakenly believes he will be killed if he does not act in a certain way will be entitled to a defence of duress rather than insanity.⁴⁰⁵ The compromise offered with this partial abolition is to allow an excuse for a “general ignorance of the law...which would excuse those rare individuals who intentionally carry out criminal acts without understanding the concept of good and evil.”⁴⁰⁶ Of note is that such a blanket exemption is reminiscent of the Butler Committee proposal for defendants suffering from severe mental illness or abnormality.⁴⁰⁷ This proposal does not appear to represent an abolition of insanity to any real extent and carries the added danger of allowing psychopaths within its scope. Mentally ill defendants, who seek to rely on their illness as a defence, do not offend because they are acting under duress or in self-defence; they offend because they are mentally ill. A better label for their type of excuse should be a lack of rationality.

4.1.7. Disposal

Where an individual is found not guilty by reason of insanity, his detention, where necessary, must not aim to punish and must offer treatment.⁴⁰⁸ There must be criteria justifying detention and enabling release.⁴⁰⁹ We must be prepared to “tak[e] some risks in the name of liberty and justice”.⁴¹⁰ Some criminals who have served a sentence will reoffend following release. Similarly, some acquittees on grounds of

⁴⁰³ Slobogin suggests that these defences have moved towards a more subjective approach, which would allow more easily for the use of mental disorder: *ibid.*, 15.

⁴⁰⁴ *Ibid.*, 2.

⁴⁰⁵ *Ibid.*, 3.

⁴⁰⁶ *Ibid.*, 8. To allow a “specific ignorance excuse” would allow the defendant “to define the scope of self-defence and other justificatory doctrines”, which would be unacceptable: 38.

⁴⁰⁷ Above n.205, para 18.18.

⁴⁰⁸ See Chapter 2.

⁴⁰⁹ Morse, above n.218, 827.

⁴¹⁰ *Ibid.*, 829

insanity will become insane again. This should not mean that we should extend preventative detention, especially nonculpable detention, beyond its current limits.

4.2. Proposed Definitions

Fingarette proposed, as a starting point for a definition of criminal insanity that a defendant should be entitled to a defence of insanity where “[t]he individual’s mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally (to respond relevantly so far as criminality is concerned)”⁴¹¹ This was not intended as a fixed formula, rather a set of principles from which a defence may be developed. The causal link remains.

The criteria for formulating a test should employ common sense understandable terms rather than the terms mental disease or defect, which do not give sufficient guidance.⁴¹² Morse⁴¹³ adapts the test suggested by the American Psychiatric Association as follows:

“It is a defense to a prosecution for an offense that, at the time of the conduct alleged to constitute the offense, the defendant’s perception and understanding of reality was grossly and demonstrably impaired and, as a result of that impairment, the defendant did not ... [cognitive and/or volitional criteria].” This avoids the use entirely of medical criteria and provides a solely legal test in understandable language.

Psychopaths, who are not out of touch with reality, would not fall within the ambit of this defence.

⁴¹¹ Fingarette, above n.203, 211. Parenthesis and emphasis from original.

⁴¹² Morse, above n.218, 808.

⁴¹³ Ibid., 809.

4.2.1. *The Cognitive Test*

The difficulty in determining how a cognitive test of insanity should be formulated lies in the fact that most 'insane' defendants will have a knowledge of their actions, but will be motivated by irrational thoughts.⁴¹⁴ Such a test must excuse the 'fundamentally irrational'⁴¹⁵ while still allowing for conviction of those deserving of blame. Moore writes⁴¹⁶ that the only appropriate question to put to a jury is: "Is the accused so irrational as to be nonresponsible?"

The *M'Naghten* Rules require the insane defendant to have made a mistake either as to the nature and quality of his act or as to its legality. However, as Fingarette and Hasse point out, it is not correct to call such an individual's delusion a mistake of fact. "He is *mad*, not *mistaken*",⁴¹⁷ as mistake "implies at least a certain minimum capacity for rationality"⁴¹⁸. Insanity concerns a defect in capacity, not in the exercise of capacity.⁴¹⁹

4.2.2. *The Volitional Test*

The Royal Commission on Capital Punishment recommended that a defence of insanity should arise where "at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."⁴²⁰ This definition would allow for a volitional limb to the defence.

⁴¹⁴ Ibid., 810.

⁴¹⁵ Ibid., 811.

⁴¹⁶ Moore, above n.266, 245.

⁴¹⁷ Fingarette and Hasse, above n.223, 25.

⁴¹⁸ Ibid., 25

⁴¹⁹ Ibid., 25

⁴²⁰ *Report of Royal Commission on Capital Punishment*, Cmnd. 8932 1949-1953 (1953), para. 333(iii).

The introduction of the defence of diminished responsibility has taken this volitional definition on board, but there has been no such progress with the insanity defence.

Morse argues that the relationship between volition and insanity is “frustratingly vague”.⁴²¹ Where an individual feels overwhelmingly compelled to act, the excuse should be based on his irrationality rather than compulsion⁴²² since a person whose desires are in conflict is not rational.⁴²³ However, Morse doubts whether insane individuals act because of ‘hard choice’ situations.⁴²⁴ Where there is no hard choice, he suggests that an individual acting out of a ‘crazy’ desire is no more compelled to act than one acting out of a normal desire.⁴²⁵

It is doubtful whether a volitional impairment will or should be included within any insanity defence. One possibility would be to expand the *M’Naghten* Rules to include volition as part of a direction to be given to a jury. However, it may be better contained within diminished responsibility where irresistible impulse is recognised as reducing an individual’s liability for punishment⁴²⁶ without wholly removing responsibility. Morse suggests⁴²⁷ that “[t]he law should require such persons to restrain themselves, even if it is hard for them to do so.” An individual should only be excused on the basis of his irrationality.⁴²⁸

⁴²¹ Morse, above n.218, 812.

⁴²² Fingarette and Hasse, above n.223, 61.

⁴²³ Morse, above n.218, 816.

⁴²⁴ *Ibid.*, 812.

⁴²⁵ *Ibid.*, 813.

⁴²⁶ Mackay, above n.208, 141.

⁴²⁷ Morse, above n.218, 820.

⁴²⁸ *Ibid.*, 813.

With impulse disorders such as kleptomania, such individuals are “cognitively rational”,⁴²⁹ yet will be suffering from a recognised mental disorder. Claims of compulsion will not be credible “except perhaps in extreme cases”.⁴³⁰ Objectively, we do not think it is fear of pain that compels an individual to act. We think that it is pleasure which compels such individuals. Where an individual is clearly disgusted with his compulsion, yet still act, then he may be regarded as irrational.⁴³¹

Agreeing with Fingarette and Hasse,⁴³² Morse concludes that extreme cases call for the individual’s actions to be described as irrational, not involuntary. Compelled behaviour is still intentional.⁴³³ Including a volitional branch to an insanity test which distinguishes between resistible and irresistible urges where the defendant otherwise appears rational “is simply too difficult.”⁴³⁴

4.2.3. Summary

The complete test proposed by Morse is “[a] defendant is not guilty by reason of insanity if, at the time of the offense, the defendant was so extremely crazy and the craziness so substantially affected the criminal behaviour that the defendant does not deserve to be punished.”⁴³⁵ There is much merit in removing the test of insanity away from medical definitions. However, this test does not do much to remove the stigma of the insanity defence, which must be phrased sensitively enough for it to be pleaded

⁴²⁹ Ibid., 813.

⁴³⁰ Ibid., 815.

⁴³¹ Ibid., 815.

⁴³² Fingarette and Hasse, above n.223, 61.

⁴³³ Ibid., 61.

⁴³⁴ Morse, above n.218, 819.

⁴³⁵ Ibid., 820.

by those in need of it, rather than have them compelled into entering a guilty plea.

The Disability of Mind doctrine proposed by Fingarette and Hasse, is expressed in the maxim, "Where there is no *mens* there can be no *mens rea*."⁴³⁶ An individual whose mental powers have been so disabled as to render him irrational in the control of his conduct will either have a reduced form of criminal responsibility or be free from it entirely. Where he is in this condition without any culpability on his part, he will not be held responsible.⁴³⁷ Such a test has merit, although, as discussed above,⁴³⁸ any form of guilty verdict does not reflect a lack of culpability.

5. Recommendations:

5.1 Substantive Definition

The insanity defence should not be abolished. It is not just to convict those who were not acting culpably, i.e. who were not responsible for their actions, at the time of committing a criminal offence. It is not sufficient to rely upon the ordinary principles of criminal law to achieve justice in such cases. There will be occasions where an 'insane' defendant who acts voluntarily and with *mens rea* should be excused his actions due to a lack of responsibility. It would be equally unfair to attach a label of 'guilty but mentally ill'.

There needs to be a clear separation between the diagnosis of mental illness and the concept of legal insanity. This can be achieved in the first instance by adopting a non-medical, non-stigmatic term to the defence. It is clear that the term 'legal insanity'

⁴³⁶ Fingarette and Hasse, above n.223, 200. The verdict of Guilty of ____, with Nonculpable Disability of Mind is discussed above.

⁴³⁷ Ibid., 201-202.

⁴³⁸ See 4.1.5.

should cease to be used. In its place should be one of the phrases proposed by Mackay, Williams or Fingarette. It is suggested that the preferred verdict should be a not guilty verdict based on “an aberration of normal mental functioning present at the time of the commission of the alleged offence.”⁴³⁹

The substantive definition of the new defence should hinge around the defendant’s lack of rationality at the time of committing the offence. Save for the most severely and permanently mentally ill, the causal connection should be retained. While, in the majority of cases, the causal link will be self-evident, it is possible to envisage an undesirable situation where, were the causal link to be removed, a defendant suffering from acute schizophrenia may kill for his own motives rather than for reasons due to his mental condition. For example, it is possible that such an individual might kill his wife in a fit of rage, motivated solely by jealousy of her receiving the attention of another man, rather than acting for reasons arising from his mental illness.

The new defence must contain three elements:

1) It must set a minimum level of rationality. This could be achieved by adapting Fingarette’s phrase, “[t]he individual’s mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally (to respond relevantly so far as criminality is concerned)”.⁴⁴⁰

A jury could be guided as to the meaning of ‘responding relevantly’ in the following terms. ‘A defendant is unable to respond relevantly where he is unable to appreciate

⁴³⁹ Mackay, above n.208, 140.

⁴⁴⁰ Fingarette, above n.203, 211. Parenthesis and emphasis from original.

the criminality (wrongfulness) of his conduct, or he honestly believes that he is unable reasonably to conform his conduct to the requirements of law.’ Such a guideline would cover the defendant who does not appreciate the nature and quality of his act, or that it is wrong, but also would include the schizophrenic defendant who believes he must act on the instructions of a divine authority. It is hoped that the latter phrase also would include the defendant who acts compulsively to the point of being irrational.

2) As the insanity defence ought not to rely purely on an individual’s status, a new defence must set out a causal link. If we are to reject a status defence of insanity, we must be prepared to offer more guidance than that suggested by Moore: “Is the accused so irrational as to be nonresponsible?”⁴⁴¹ as it is not satisfactory, for reasons already discussed, to remove the causal element in any form of an insanity defence. It may be worthwhile removing the stigmatic element from the definition proposed by Morse in order to use the cognitive element as follows “*and D’s irrationality so substantially affected the criminal behaviour that the defendant does not deserve to be punished.*”⁴⁴²

3) The defendant’s mental condition must be nonculpable. It is not desirable to include a further volitional test. To include the volitional element within the definition below may be tautologous. An irresistible urge so strongly felt as to cause the defendant to act in an irrational manner should satisfy the above definition without requiring further elaboration.

⁴⁴¹ Moore, above n.266, 245.

Thus, a tentative proposal for a revised insanity defence is:

1. A defendant will be found not guilty by reason of an aberration of normal mental functioning if:

a) at the time of commission of the offence, his mental condition was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally;

and

b) his lack of capacity to act rationally:

i) was nonculpable; and;

ii) so substantially affected his criminal behaviour that he does not deserve to be punished.

2. A defendant lacks the capacity to act rationally if he is unable to respond relevantly in deciding whether or not to commit a criminal offence, and he is unable to respond relevantly where:

a) he is unable to appreciate the criminality (wrongfulness) of his conduct, or

b) he honestly believes that he is unable reasonably to conform his conduct to the requirements of law.

3. A defendant who, by reason of severe mental illness or severe mental abnormality, permanently lacks the capacity to act rationally need satisfy only the criteria in 1.a) above.

4. 'Permanently' shall be construed as 'enduring from childhood, (or as a result of brain damage induced by serious illness or accident) from which there is no reasonable prospect of recovery.'

⁴⁴² Morse, above n.218, 820.



CHAPTER FOUR

DIMINISHED RESPONSIBILITY

1. Introduction

The defence of insanity is used infrequently. Where diminished responsibility is available as an alternative, many defendants will opt for its more favourable disposal consequences,⁴⁴³ choosing unnecessarily to concede criminal responsibility and suffer punishment. While diminished responsibility should not be concerned with moral agency and the minimal conditions of criminal responsibility, in practice, individuals who are not eligible to be held criminally responsible are using the defence for want of a more appropriate alternative. This inappropriate and overuse of the defence warrants consideration.

The partial defence of diminished responsibility allows a reduction in the criminal responsibility of a defendant who kills with malice aforethought. The defence gives the court the discretion to punish according to its perception of the defendant's reduced level of culpability, thus avoiding the constraint of the mandatory life sentence for murder. Despite the narrow wording of the test, which requires the defendant to be suffering from an abnormality of mind, arising from arrested or retarded development of mind, inherent causes, disease or injury,⁴⁴⁴ the defence has been pragmatically⁴⁴⁵ interpreted in the courts "in accordance with the morality of the case rather than as an application of psychiatric concepts."⁴⁴⁶ The defence has been allowed in situations where the defendant was suffering from PMT,⁴⁴⁷ battered

⁴⁴³ See below, n.453.

⁴⁴⁴ S2(1) Homicide Act 1957.

⁴⁴⁵ Mackay, *Mental Condition Defences in the Criminal Law* (1995), 184-85.

⁴⁴⁶ Williams, *Textbook of Criminal Law* (2nd ed., 1983), 693.

⁴⁴⁷ Smith [1982] *Crim LR* 531.

woman syndrome,⁴⁴⁸ jealousy,⁴⁴⁹ and also where the defendant has carried out a mercy killing.⁴⁵⁰ However, even in the most extenuating circumstances, the defence will reduce murder to manslaughter but not lead to an acquittal. In such cases, an absolute or conditional discharge is possible.

Mental disorder plays a significant role in removing or reducing criminal responsibility and the defence of diminished responsibility constitutes a major part in this process. Of the forty murder charges in 1992 which resulted in a transfer from prison to a mental hospital under section 48 of the Mental Health Act 1983, twenty-nine of them were reduced to manslaughter on grounds of diminished responsibility, with only six of the charges resulting in murder convictions.⁴⁵¹ Of the remainder, one charge was withdrawn, there was one acquittal, and the remaining cases resulted in verdicts of insanity, unfitness to plead and infanticide.

Since its introduction in 1957, the defence of diminished responsibility has “eclipsed” verdicts of insanity and unfitness to plead.⁴⁵² Where it might have been expected that these verdicts would remain static and diminished responsibility would fill a gap not already covered by the two existing mental disorder defences, this has not been the case.⁴⁵³ While the scope of diminished responsibility has been to include those

⁴⁴⁸ *Ahluwalia* [1992] 4 All ER 889.

⁴⁴⁹ *Miller*, The Times, May 16, 1972; *Asher*, The Times, June 9, 1981.

⁴⁵⁰ *Price*, The Times, December 22 1971.

⁴⁵¹ Mackay, “Diminished Responsibility and Mentally Disordered Killers”, in *Rethinking English Homicide Law* (2000, Oxford University Press), 56.

⁴⁵² *Ibid.*, 57.

⁴⁵³ *Ibid.*, 58. Research conducted by Mackay and Kearns shows that, in the first five years of operation of the 1991 Act, murder was charged in only 9.1% of special verdicts and in only 8.2% of cases where the unfitness provisions were used. This can be contrasted with the incidences of diminished responsibility which peaked at 109 in 1979 but fell to 47 in 1997/8: See Mackay and Kearns, “More Facts about the Insanity Defence” [1999] *Crim LR* 714; Mackay and Kearns, “An Upturn in Unfitness to Plead? Disability in Relation to the Trial under the 1991 Act” [2000] *Crim LR* 532; Home Office, *Criminal Statistics for England and Wales for 1998* (Cm. 4649), Table 4.7.

individuals who do not satisfy the rules on insanity or unfitness to plead, the defence has also “partly *replaced* the plea of insanity, rather than supplementing it,”⁴⁵⁴ the effect being that the number of individuals who have killed and seek to reduce their murder charge on the grounds of their mental disorder has not increased. The inexorable conclusion must be that certain individuals are now being held criminally responsible where, previously, under the *M’Naghten* Rules, they would not have been so regarded.⁴⁵⁵ Although it is not known why this has occurred, the refusal of Parliament to incorporate more flexibility of disposal where the special verdict is used in murder cases into the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 must serve as a strong deterrent to individuals who kill while suffering from a mental disorder.

While diminished responsibility has largely taken over from the insanity defence on a charge of murder, the role of the jury has decreased where a diminished responsibility plea is made.⁴⁵⁶ Since 1968, when the Court of Appeal in *Cox*⁴⁵⁷ confirmed that where medical evidence was in agreement, the prosecution could accept a plea of guilty to manslaughter, the majority of cases have been dealt with without the need for a jury.⁴⁵⁸ It is surprising, given the obscure wording of section 2, that medical experts are able to provide such a level of judgment in place of a jury,⁴⁵⁹ especially in the light of the comments by Lord Parker C.J. in *Byrne*, that the question as to whether impairment is substantial is a matter for juries to determine and “a matter on which

⁴⁵⁴ Sparkes, “Diminished Responsibility in Theory and Practice” [1964] 27 *MLR* 9, 32. (Emphasis in original).

⁴⁵⁵ Mackay, above n.451, 57.

⁴⁵⁶ This is in contrast to the defence of provocation where the jury must play an active role in deciding issues relating to loss of self-control: Mackay, above n.451, 63.

⁴⁵⁷ (1968) 52 Cr App R 130.

⁴⁵⁸ Mackay, above n.451, 61. By 1986-8, less than 15% of diminished responsibility pleas were contested at trial, compared with a figure of 20% during 1976-7.

⁴⁵⁹ *Ibid.*, 62.

juries may quite legitimately differ from doctors.”⁴⁶⁰ The effect of this decreased role of the jury is that the most significant mental disorder defence to a murder charge is rarely put to the test at trial, which may account for its inadequacies being sufficiently masked in order for it to operate in a pragmatic manner.⁴⁶¹ However, it cannot be right that a defence which is employed more “in accordance with the morality of the case rather than as an application of psychiatric concepts”⁴⁶² and is more likely to succeed in cases of mental instability or where compassion requires a reduction of sentence⁴⁶³ should be left to the judgment of medical experts without any input from a jury.

This chapter will proceed to examine the substantive definition of the defence. A critique of the defence will be provided, taking into account the overlap with the defence of provocation in the light of the House of Lords decision in *Smith (Morgan)*.⁴⁶⁴ Proposals for reform will be reviewed and a recommendation made.

2. The Substantive Defence

This section will examine section 2 of the Homicide Act 1957 in the context of the leading case of *Byrne* and the introduction of a volitional element to the defence. The four aetiologies will be considered, as will the meaning of mental responsibility, with a view to examining the widening conditions which may now attract a defence of diminished responsibility.

Section 2(1) of the Homicide Act 1957 provides that a person shall not be convicted

⁴⁶⁰ [1960] 3 all ER 1, 5.

⁴⁶¹ Mackay, above n.445, 184-5.

⁴⁶² Williams, above n.446, (1983), 693.

⁴⁶³ Williams, *Criminal Law: the General Part*, (1961), 546.

⁴⁶⁴ [2000] 3 WLR 654.

of murder “if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired⁴⁶⁵ his mental responsibility for his acts or omissions in doing or being a party to the killing.” The intention behind this wording was to exclude killings caused by emotions such as anger, jealousy and hate, which include cases which could be supported by medical evidence.⁴⁶⁶

2.1 Abnormality of Mind as Substantially Impairs Mental Responsibility

The Court of Criminal Appeal in the leading case of *Byrne*⁴⁶⁷ held that abnormality of mind “means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.” It is a term which is wide enough to cover “the mind’s activities in all its aspects”, including the ability to exercise will power and to control physical acts. This decision goes beyond issues of cognition and enables account to be taken of irresistible impulse in the criminal law, but only for a charge of murder. That this defence allows a defect of volition to reduce culpability marks perhaps the most significant distinction between the defence of insanity, which will only be allowed as a defence where there is a defect in cognition, and that of diminished responsibility.

Psychopaths and other individuals who suffer from irresistible impulses which can only be satisfied by killing another human being, may be able to rely upon this defence. This perception is supported by the decision in *Byrne*⁴⁶⁸ which resulted in the

⁴⁶⁵ The term ‘substantial impairment’ involves a subjective judgment: Williams, above n.463, 548.

⁴⁶⁶ Governmental statements on the second reading of the Bill, November 15, 1956 (Parl. Deb., H. of C., Vol.560, cols. 1154, 1252) from Williams, above n.463, 542.

⁴⁶⁷ [1960] 3 All ER 1, 4.

⁴⁶⁸ Ibid.

inclusion of psychopathy as a mental abnormality for the defence of diminished responsibility, there being no reason why it should be allowed for sexual psychopathy but excluded from application to non-sexual psychopathy.⁴⁶⁹

However, allowing impaired volition to amount to a defence of diminished responsibility carries with it problems of proof. An impulse that could not be, rather than was not, resisted is “incapable of scientific proof”⁴⁷⁰ and can only be determined by the common sense of a jury, rather than reliance on medical expertise.⁴⁷¹ It should be noted also that the defendant need suffer only a *substantial*, rather than total impairment. On this point, the Butler Committee commented that “[t]he idea that ability to conform to the law can be measured is particularly puzzling.”⁴⁷² Critics of *Byrne* have described the notion of irresistible impulse as “incoherent”.⁴⁷³ However, as a consequence of the defendant’s *substantial* impairment of his mental responsibility, his criminal responsibility will only be *reduced*.⁴⁷⁴ There is no requirement for evidence showing that his impulse could not be resisted.⁴⁷⁵ He need only show that the difficulty in controlling his impulse “was *substantially* greater than would be experienced in like circumstances by an ordinary person not suffering from mental abnormality.”⁴⁷⁶ Mackay suggests this means there will never be evidence that the impulse could not be resisted by the defendant and therefore there may be no reason to excuse him. This leads to the question of whether it is ever right to excuse an individual where he could have avoided committing the offence if the impulse was

⁴⁶⁹ Williams, above n.463, 542.

⁴⁷⁰ [1960] 3 All ER 1, 5.

⁴⁷¹ Mackay, above n.451, 63.

⁴⁷² Report of the Committee on Mentally Abnormal Offenders, Cmnd. 6244 (1975), para. 19.5.

⁴⁷³ Kenny, “The Expert in Court” (1983) 99 LQR 197, 210. If an individual acts on impulse, he must be acting voluntarily. If acting voluntarily, he must have been able to act otherwise.

⁴⁷⁴ Mackay, above n.451, 71.

⁴⁷⁵ *Ibid.*, 71.

⁴⁷⁶ J.C. Smith, *Smith and Hogan: Criminal Law* (9th ed., 1999), 213 (emphasis in original).

not uncontrollable.⁴⁷⁷ While J.C. Smith argues that an individual who is less able to resist an impulse than the ordinary man should bear a reduced amount of responsibility for his act,⁴⁷⁸ Mackay suggests that this will be true only where the act is murder. Further, while there are policy reasons for allowing a reduction in responsibility for murder, this should not compel the conclusion that it is wrong to punish those who kill intentionally due to a volitional defect.⁴⁷⁹ However, nor should this compel the opposite conclusion. It may be preferable to argue that Smith's statement should be applied to all offences, and the defence of diminished responsibility extended accordingly.⁴⁸⁰

The meaning of the phrase 'abnormality of mind' has not been analysed to a great degree by the courts,⁴⁸¹ yet it is clear that this term has allowed an increasing number of conditions falling far short of insanity. The meaning of abnormality of mind is left to medical expertise, and opinions vary.⁴⁸² Lord Parker in *Byrne*⁴⁸³ originally envisaged a state "which in popular language (not that of the *M'Naghten* Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity." However, it has become clear that the defendant's mental state need not be viewed in such a way for a defence of diminished responsibility to succeed. In *Seers*,⁴⁸⁴ the

⁴⁷⁷ Mackay, above n.451, 71-72.

⁴⁷⁸ J.C. Smith, above n.476, 214.

⁴⁷⁹ Mackay, above n.451, 72.

⁴⁸⁰ See below, 4.2.

⁴⁸¹ In Australia, there has been some attempt at interpretation of the term 'abnormality of mind'. In *McGarvie* (1986) 5 NSWLR 270, 272 the court required an abnormality of mind to have 'some continuance'. However, the Criminal Court of Appeal in *Whitworth* (1987) 31 A Crim R 453 criticised *McGarvie* commenting that if, for example, stress is severe enough, the mind may not be able to endure and then it may be described as an inherent cause. It will also be a question of degree in each case whether the stress caused injury. *Tumanako* (1992) 64 A Crim R 149 also disputed *McGarvie* on the basis that the inherent cause must be permanent but the abnormality may be fleeting.

⁴⁸² Dell, *Murder into Manslaughter – The Diminished Responsibility Defence in Practice*, 39.

⁴⁸³ [1960] 3 All ER 1, 5.

⁴⁸⁴ (1984) 79 Cr App Rep 261.

Court of Appeal, following comments made by the Privy Council in *Rose v R*,⁴⁸⁵ found that it was a material misdirection to tell a jury that the defendant must be on the borderline of insanity. An abnormality of mind as substantially impairs mental responsibility can include, *inter alia*, battered woman syndrome,⁴⁸⁶ depressive illness, and even a mercy killing.⁴⁸⁷

The only constraint to this apparently generous interpretation of s2 is that the abnormality of mind must be attributable to the causes listed in parenthesis: arrested or retarded development, inherent causes, disease or injury. In *Sanderson*⁴⁸⁸ the Court of Appeal held that abnormality of mind could be equated with paranoid psychosis arising from an inherent cause. In this case the inherent cause was upbringing. However, it should be noted that *dicta* in this case suggest that reactive depression may now be excluded from within the scope of the defence.⁴⁸⁹ Roch LJ said that a judge should tailor his directions to the jury to suit the facts of the case,⁴⁹⁰ which will allow juries to ignore irrelevant causes.⁴⁹¹ He also added that the term 'disease' meant disease of the mind which could cover both organic and functional mental illness.⁴⁹² This may exclude psychological causes, i.e. neither functional nor organic which may, in turn, render it difficult to allow the use of the defence in the future in cases of mercy killings.⁴⁹³

⁴⁸⁵ [1961] 1 All ER 859.

⁴⁸⁶ *Ahluwalia* [1992] 4 All ER 889.

⁴⁸⁷ *Price* [1971] *The Times*, 22 December.

⁴⁸⁸ (1994) 98 Cr App R 325, 336 (Roch LJ)

⁴⁸⁹ *Simester and Sullivan, Criminal Law: Theory and Doctrine* (2000), 582. See also Mackay, [1999] *Crim LR* 117.

⁴⁹⁰ *Sanderson* (1994) 98 Cr App R 325, 334.

⁴⁹¹ Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] *Crim LR* 117, 121.

⁴⁹² *Sanderson* (1994) 98 Cr App R 325, 336.

⁴⁹³ Mackay, above n.491, 122.

Mackay suggests that the words in parenthesis are legal rather than medical terms but notes a reluctance of the courts to delve into this area.⁴⁹⁴ The parenthesis qualifying 'abnormality of mind' in section 2(1) originated from the definition of mental defectiveness in section 1(2) of the Mental Deficiency Act 1927. While the parenthesis seemed to allow for a broad interpretation of the phrase in 1927, it was intended for limitation in the 1957 Act.⁴⁹⁵ Hence, "it becomes vital to know what kinds of causes are 'inherent', what kinds of trauma will count as 'injury' and what...is meant by 'disease.'" In turn, this places greater reliance on the opinion of medical experts.

2.2 Abnormality of Mind and Intoxication

Where alcoholism has caused brain damage or psychosis, this will amount to an abnormality of mind under section 2.⁴⁹⁶ Where a state of intoxication brought about by alcoholism is claimed to amount to an abnormality of mind, nothing less than a craving for a drink will suffice for the defence of diminished responsibility⁴⁹⁷ The first drink must be involuntary. If the craving is irresistible, this may be sufficient abnormality to allow a defence.⁴⁹⁸

It has been suggested that the courts are using "the taint of intoxication" to remove the possibility of diminished responsibility as a defence.⁴⁹⁹ It will be extremely difficult to show, in cases of alcoholism, that it was the first drink, and not subsequent drinks

⁴⁹⁴ Mackay, above n.445, 185.

⁴⁹⁵ Griew, "The Future of Diminished Responsibility" [1988] *Crim LR* 75, 77.

⁴⁹⁶ *Tandy* [1989] 1 All ER 267; *Inseal* [1992] *Crim LR* 35.

⁴⁹⁷ *Fenton* (1975) 61 Cr App R 261.

⁴⁹⁸ *Tandy* [1989] 1 All ER 267.

⁴⁹⁹ Mackay, above n.445, 197.

taken during the course of the day, which was irresistible.⁵⁰⁰ In addition, differences between equally culpable members of the same class may arise. It is possible that one defendant could begin drinking first thing in the morning in order to suppress withdrawal symptoms, while another may be unable to purchase an alcoholic drink before the onset of withdrawal symptoms. Both may be in the same state of intoxication when committing a crime, yet different decisions could result, with the law favouring the second defendant.⁵⁰¹

Where the defendant is suffering from another abnormality of mind, the Court of Appeal in *Gittens* held that any disinhibiting effect of alcohol on the defendant's personality should be disregarded. The test was consolidated in *Atkinson*.⁵⁰² A jury must consider if the defendant had not taken drink or drugs 1) would he have killed as he did and 2) would he have been acting under a diminished responsibility when he did? These hypothetical questions are impossible to answer.

The test was used again in *Egan*⁵⁰³ where the Court of Appeal ruled that the question which should have gone to the jury was "was the appellant's abnormality of mind such that he would have been under diminished responsibility, drink or no drink?". The Court's application of the test may be wrong given that there may not need to be a causal link between the abnormality of mind and the killing. In *Egan* it may have been more appropriate to direct the jury 'to be satisfied that if D had killed in the same

⁵⁰⁰ Sullivan, 'Intoxicants and Diminished Responsibility', [1994] *Crim LR* 156, 157.

⁵⁰¹ *Ibid.*, 158-159.

⁵⁰² [1985] *Crim LR* 314, approving *Gittens* [1984] 3 All ER 252.

⁵⁰³ [1992] 4 All ER 470.

circumstances but in a sober state his responsibility would have been substantially impaired because of his borderline subnormality.’⁵⁰⁴

One case which may have a considerable impact on the application of intoxication to the diminished responsibility defence is *O’Connell*⁵⁰⁵ in which *dicta* of the Court of Appeal excluded alcohol from falling within the term ‘injury’ within the four aetiologies. The Court did not distinguish between a soporific drug, as was used in this case, and intoxicants such as alcohol. Rather than such a restrictive approach, it may be preferable for the Court to allow ‘injury’ to include a temporary malfunctioning of the mind caused by drugs with the exclusion of self-induced intoxication, which will require reference to the common law principle that intoxication will not excuse.⁵⁰⁶ This case perhaps illustrates best the dangers of defining the four aetiologies beyond use, and the need for greater clarity to avoid confusion.

3. Critique of Diminished Responsibility

This section will provide a critique of the defence of diminished responsibility, addressing three main issues: the lack of firm rationale for introducing the defence; the obscure wording of the defence, in particular, the ambiguous meaning of ‘mental responsibility’; and whether responsibility can ever be only diminished, rather than removed completely. Finally, a detailed consideration of the overlap between

⁵⁰⁴ Sullivan, above n.500, 160.

⁵⁰⁵ [1997] *Crim LR* 683.

⁵⁰⁶ Mackay, above n.491, 124-125.

provocation and diminished responsibility will be made in the light of the House of Lords decision in *Smith (Morgan)*.

3.1 Lack of Rationale

The defence of diminished responsibility was enacted in England almost a century after its adoption in Scotland, but for essentially the same reason: the avoidance of the death penalty for murder.⁵⁰⁷ Since the death penalty was abolished in 1969, the original aim of the defence of diminished responsibility has been redundant. However, it has continued to provide an alternative function in the avoidance of the mandatory life sentence for murder, as “a special device for.....untying the hands of the judge in murder cases”,⁵⁰⁸ or, less positively, as “a device for circumventing the embarrassments that flow from a mandatory sentence.”⁵⁰⁹ The defence also recognises that certain types of mental abnormality may fall short of insanity but still warrant more lenient treatment of the defendant.⁵¹⁰

The Royal Commission on Capital Punishment chose not to recommend the adoption of the diminished responsibility defence, opting instead for an extension of the insanity defence.⁵¹¹ Yet, Parliament ignored the Commission’s advice and introduced the defence. That the Commission’s expertise was disregarded and the defence introduced due to an unsatisfactory inflexibility over the penalty for murder signifies that it was not drafted as a defence aimed at recognising a reduced level of culpability

⁵⁰⁷ Dell, above n.482, 1. For a history of the development of the defence, see Walker, *Crime and Insanity in England*, vol.1 (1968)

⁵⁰⁸ Above n.472.

⁵⁰⁹ Dell, “Diminished Responsibility Reconsidered” [1982] *Crim LR* 809, 814. See also Wootton, “Diminished Responsibility: A Layman’s View [1960] 76 *LQR* 224, 236: “The concept...is simply an attempt to escape from the shackles of a penalty that is rigidly fixed by statute.”

⁵¹⁰ Williams, above n.463, 541.

⁵¹¹ Report of Royal Commission on Capital Punishment, Cmnd. 8932 (1953), paras. 333(iii), 413, 595.

in an individual. Rather, it was introduced as a matter of policy apparently in order to avoid the death penalty and, subsequently, the mandatory life sentence.

3.2 Mental Responsibility

While the four aetiologies have been criticised for their lack of clarity,⁵¹² it is the phrase 'mental responsibility' which gives perhaps the greatest cause for concern. It is not clear whether this means moral or legal, i.e. criminal, responsibility. If the phrase is taken to mean 'liability to a reduced punishment'⁵¹³ then it cannot be said, in substitution of the phrase in s2(1), that this is something from which a person is *suffering*. If it means mental capacity which is a precondition of legal responsibility, then it may be inappropriate to punish an individual, even in a reduced form, who was mentally incapable for whatever reason at the time of the act.⁵¹⁴ An agent who is mentally incapable is not rational. An individual who is not rational is not a moral agent and should not be liable to punishment.

The common perception appears to be that the term is referring to mental capacity. The Butler Committee recognised the term as either 'a concept of law or a concept of morality; it is not a clinical fact relating to the defendant.'⁵¹⁵ Williams suggested it was not a legal concept as 'legal responsibility in the sense of liability to conviction either exists or it does not',⁵¹⁶ but that the term 'responsibility' has a 'strong ethico-legal tinge', which may be equivalent to 'culpability'.⁵¹⁷ Griew suggests⁵¹⁸ that in

⁵¹² See 2.1 above.

⁵¹³ Sparks, above n.454, 13.

⁵¹⁴ Ibid., 14-15.

⁵¹⁵ Above n.472, para. 19.5.

⁵¹⁶ Williams, above n.446, 686.

⁵¹⁷ Williams, above n.463, 548.

⁵¹⁸ Griew, above n.495, 81-82.

using the phrase 'mental responsibility', Parliament has confused two concepts "– those of reduced (impaired) capacity and of reduced (diminished) liability. The former presumably justifies the latter by virtue of a third idea – that of reduced culpability." If, then, the concept is one of morality, it certainly does not follow that medical experts are in a better position to make an assessment of the defendant's moral responsibility⁵¹⁹ and the use of medical expertise must be questioned.⁵²⁰

'Irresponsibility' is often associated with anti-social or bad behaviour.⁵²¹ Yet, this is not the context in which mental responsibility should be taken. 'Irresponsible' may alternatively mean 'irresponsive' in the sense of not responding to punishment or reward, although this term is unlikely to be understood by a jury.⁵²² The meaning of diminished responsibility may be described more appropriately as representing a "diminished power to resist temptation, or, conversely, excessive sensibility to temptations".⁵²³

To summarise, it is an individual's responsibility for his acts which should lie at the centre of a defence of diminished responsibility. For Parliament to have confused this concept by inserting the word 'mental' in front of 'responsibility' is to have compacted two ideas together⁵²⁴ to the point of eliminating their true meaning. The concepts of reduced capacity and reduced liability need to be kept separate. An individual's mental capacity should determine, firstly, whether he is minimally

⁵¹⁹ Mackay, above n.445, 192.

⁵²⁰ This is also the view of the Butler Committee, above n.472, para 19.5.

⁵²¹ Wootton, above n.509, 231.

⁵²² Ibid., 231.

⁵²³ Ibid., 231.

⁵²⁴ Griew, "Reducing Murder to Manslaughter: Whose Job?" (1986) 12 *Journal of Medical Ethics* 18, 19-20.

responsible. Only when he is found to be a responsible agent should the question of his reduced mental capacity enable his reduced liability to punishment to be taken into account.

3.3 Partial Responsibility

The defence of diminished responsibility offers an uncomfortable compromise between ascribing full responsibility for a crime and the removal of all responsibility. An individual who successfully uses the defence will be found guilty of a lesser crime and liable to a lesser degree of punishment. It has been suggested that the appropriate use of the defence of diminished responsibility should never be to mitigate a sentence.⁵²⁵ If we do not view the defendant as culpable, there should be a complete acquittal. Sparks suggests⁵²⁶ that it is not only the extent of mental impairment which must be considered but also whether the defendant could have avoided doing the act. It must be true that an individual either could or could not have avoided committing the act. If he could, then he should be held responsible. If he could not, then he should be completely excused from punishment.⁵²⁷ It makes no sense to punish an individual who is mentally ill. Lord Justice-General Normand, in a Scottish case,⁵²⁸ said: "The defence of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible."

Wasik suggests that if we do not use the term 'responsible' in the above quote but, instead, substitute 'liable to punishment' then the statement appears less true. In moral

⁵²⁵ Sparks, above n.454.

⁵²⁶ Ibid., 15-16.

⁵²⁷ Ibid., 16.

⁵²⁸ *Kirkwood v H.M. Advocate*, 1939 JC 36, 40.

terms, it is possible to have a "gradation in the efficacy of various excuses."⁵²⁹ While it is probable that we would find a mother who kills her terminally ill child in order to save him from further pain less *blameworthy* than a serial killer, nevertheless, if she acted rationally, she is a moral agent who is eligible to be held responsible for her actions. The question is whether we would be able also to describe her as *less* responsible. The two concepts are not inextricably bound. An individual who is less blameworthy may be fully responsible though his reasons for his act and surrounding circumstances affect his blameworthiness. A mercy killer, for example, will be fully responsible but less blameworthy. Such an individuals ought not to be obliged to rely upon the defence of diminished responsibility, since it does not accurately reflect his condition, but no other option is currently available.

As discussed above,⁵³⁰ a person may be irrational in terms of his conduct, emotions and attitude. Morse's 'working definition' of rationality requires consideration of "the sensibleness of the actor's goals and the logic of the means chosen to achieve them."⁵³¹ Rationality is the ability 'to be sensitive and responsive to relevant changes in one's situation and environment - that is, to be flexible.'⁵³² 'Irrationality', Morse describes, as the opposite of all these criteria.⁵³³ While the defence of insanity gives an excuse where there is a total lack of rationality, there will be degrees of rationality along a continuum and it is possible that an individual who is not entitled to a full

⁵²⁹ Wasik, "Partial Excuses in the Criminal Law" [1982] *MLR* 516, 517.

⁵³⁰ See Chapter Three, 2.2.1.

⁵³¹ Morse, above n.218, 783

⁵³² Wolf, *Freedom within Reason* (New York, 1990), 69, from Morse, "Diminished Capacity" in *Action and Value in Criminal Law*, eds. Shute, Gardner and Horder (1993), 248.

⁵³³ Morse, above n.532, 248.

excuse may nevertheless be 'non-culpably compromised' and ought to be partially excused.⁵³⁴

Abolition of the partial responsibility variant of diminished responsibility is advocated also by those who argue that individuals should be punished to the same extent as those with the same *mens rea* for a particular crime. While there is a moral claim for allowing the defence, the difficulties in implementing it without too arbitrary use of discretion are insurmountable in legal terms.⁵³⁵

Morse argues, when we consider a mercy killer, we must distinguish between finding him legally responsible for his act and not wanting to blame him as much as a cold blooded killer due to his reduced culpability.⁵³⁶ He suggests a 'guilty but partially responsible' verdict, which would apply to all crimes and offer a mandatory reduction in sentence, recognising the defendant was responsible but not completely so.⁵³⁷ In the case of a mercy killer, who can be described as fully responsible for his actions, it may be preferable to recognise a reduced level of blameworthiness in the form of an alternative defence to diminished responsibility, because of his reasons for killing, rather than a reduced level of responsibility. A mercy killer ought not to be given automatically the same sentence as a cold blooded killer,⁵³⁸ nor should he be convicted of the same offence.

⁵³⁴ Ibid., 249.

⁵³⁵ Morse, "Undiminished Confusion in Diminished Capacity" 75 *Journal of Criminal Law and Criminology* 1, 30.

⁵³⁶ Ibid., 36.

⁵³⁷ Morse, above n.532, 271.

⁵³⁸ Dell, above n.482, 56.

3.4 Diminished Responsibility and Provocation

While diminished responsibility enquires into an individual's abnormality of mind, the defence of provocation, now contained under s3 of the Homicide Act 1957, originally set its standard by the reasonable man. It has been suggested that the partially objective test of provocation is not helpful in assessing why an individual failed to control himself, as most jurors will not have experienced such an extreme situation as leads a person to kill.⁵³⁹ Also, the objective test, in recent years, has lost much of its objectivity, given that many characteristics of the defendant may now be taken into account in assessing whether the reasonable person would have acted as the defendant did. As some of these characteristics may be linked to the defendant's mental state, the substantial overlap which now exists between the defences of provocation and diminished responsibility requires further consideration.

The law is prepared to allow provocation as a defence of partial responsibility to individuals who are, arguably, less deserving than the mentally abnormal.⁵⁴⁰ Until the House of Lords judgment in *Smith*⁵⁴¹ the extent of the overlap between diminished responsibility and provocation was not settled. Despite indications to the contrary from the Privy Council case of *Luc Thiet-Thuan*,⁵⁴² the House of Lords in *Smith* has shown a continued willingness to allow a jury to take into account, where it is necessary in the interests of justice, characteristics which have a bearing on the accused's level of self-control. This decision, as with the Court of Appeal decisions in

⁵³⁹ Mackay, above n.451, 74.

⁵⁴⁰ Morse, above n.535, 30.

⁵⁴¹ [2000] 3 WLR 654.

⁵⁴² [1997] AC 131.

cases such as *Ahluwalia*,⁵⁴³ *Humphreys*,⁵⁴⁴ *Dryden*⁵⁴⁵ and *Thornton (No.2)*,⁵⁴⁶ has indicated a large area of overlap between the two defences.

The defendant in *Smith* was suffering from a depressive illness which affected his capacity for self-control. The Court of Appeal substituted his murder conviction for manslaughter, and the House of Lords, by a majority decision, dismissed the Crown's appeal. Lord Slynn suggested that Lord Diplock in *Camplin*⁵⁴⁷ did not limit characteristics which could be applied to the reasonable man to those of only age or sex. Lord Slynn was of the opinion that section 3 does not intend such a rigid distinction between two different types of characteristics⁵⁴⁸ and he suggested that the same view was held by Lord Diplock in *Camplin* when he stated⁵⁴⁹ "[t]he distinction as to the purposes for which it is legitimate to take the age of the accused into account involves considerations of too great a nicety". Lord Slynn did not consider that s2 of the Homicide Act 1957 prevented this conclusion, pointing out that the two defences are significantly different in that provocation deals with external factors to the defendant whereas diminished responsibility does not.⁵⁵⁰

Lord Hoffmann gave a similar analysis of *Camplin*. While age was singled out as the relevant characteristic for *Camplin*, it was not meant to be a "one-size-fits-all direction".⁵⁵¹ On the distinction between diminished responsibility and provocation, his Lordship conceded that there is a philosophical distinction between partially

⁵⁴³ [1992] 4 All ER 859.

⁵⁴⁴ [1995] 4 All ER 1008.

⁵⁴⁵ [1995] 4 All ER 987.

⁵⁴⁶ [1996] 2 All ER 1023.

⁵⁴⁷ [1978] AC 705, 717.

⁵⁴⁸ [2000] 3 WLR 654, 661.

⁵⁴⁹ [1978] AC 705, 718.

⁵⁵⁰ [2000] 3 WLR 654, 661.

⁵⁵¹ *Ibid.*, 671.

excused normal behaviour in response to external circumstances and mental characteristics which prevent a defendant from acting normally, but thought it was difficult to distinguish between the two in practical terms and that "it is wrong to assume there is a neat dichotomy between the "ordinary person" contemplated by the law of provocation and the "abnormal person" contemplated by the law of diminished responsibility."⁵⁵² Parliament may not have given any thought to there being an overlap between the two defences but, unless juries are told to ignore characteristics in a provocation case which could lead to a defence of diminished responsibility, "there is no point in claiming that the defences are mutually exclusive."⁵⁵³

Lord Clyde, also concurring, was of the opinion that there was room for overlap between the defences of provocation and diminished responsibility and that the scope of the common law defence of provocation, as is now defined by statute, "should not be determined by the arrival of the distinct statutory defence of diminished responsibility."⁵⁵⁴ All characteristics of the defendant, save for pugnacity and excitability, should be taken into account and this includes characteristics which have a bearing on the defendant's level of self-control.⁵⁵⁵

Lord Hobhouse, dissenting, argued that while the function of the defence of provocation was to show mercy for inadequates, this ancient sentiment is no longer significant since the introduction of the defence of diminished responsibility and "[t]he absence of a consideration of the significance of s2 of the act of 1957 is a

⁵⁵² Ibid., 672.

⁵⁵³ Ibid., 673.

⁵⁵⁴ Ibid., 680.

⁵⁵⁵ Ibid., 684.

striking feature of most of the judgments on s3.”⁵⁵⁶ Both sections address the fact that the defendant’s act was unlawful but recognise that he may not have been completely responsible at the time of committing the offence.⁵⁵⁷ Significantly, Lord Hobhouse pointed out that this case, as with other similar cases, had come before the courts where the defendant had failed, or in other cases been unwilling, to satisfy the jury of his entitlement to the defence of diminished responsibility. It would seem to be “contrary to....policy to extend s3 to give him the defence advisedly denied him by s2.”⁵⁵⁸ His Lordship criticised the failure of the courts to take into account the “interaction of sections 2 and 3”, not only to show that s3 is strained in its interpretation, but also to show that s3 does not need to be strained to avoid injustice, as s2 is sufficient to avoid such difficulties.⁵⁵⁹

Lord Millett, also dissenting, contrasted the two defences: with diminished responsibility, the jury may say that the defendant was not responsible for his actions; with provocation, “[a]ny one of us might have reacted in the same way....”The defendant’s loss of self-control “must be attributable to something which is external to himself.”⁵⁶⁰ His Lordship argued that post-natal depression, personality disorders and chronic inability to exercise self control ought not to fall within the defence of provocation and that, even if they could not be brought within the defence of diminished responsibility, “the objective element of provocation should not be eroded

⁵⁵⁶ Ibid., 693-694.

⁵⁵⁷ Ibid., 694.

⁵⁵⁸ Ibid., 695.

⁵⁵⁹ Ibid., 696. For example, the Court of Appeal in *Byrne* ruled out provocation as a defence to a sexual psychopath. Diminished responsibility was the only defence available to him.

⁵⁶⁰ Ibid., 711.

and its moral basis subverted in order to provide a defence of diminished responsibility outside the limits within which Parliament has chosen to confine it.”⁵⁶¹

The effect of the decision in *Smith* is to allow for so many characteristics of the defendant to be included in the objective test that it can no longer be described as truly objective. Such characteristics will not only be confined to mental disorders which affect the gravity of the provocation but to most other characteristics, save for pugnacity, jealousy or excitability,⁵⁶² which affect the level of the defendant’s self-control. The breadth of such acceptable characteristics is unclear. Lord Hoffmann stated⁵⁶³ that the circumstances must be “such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offence from murder to manslaughter.” Simester and Sullivan⁵⁶⁴ point out: “All that may be safely gleaned from the judgments of Lords Hoffman and Clyde is that an admissible characteristic may be temporary or permanent, may fall short of any recognised medical disorder, but will not include the destabilising effects of drugs or alcohol and shortcomings of character.”

Lords Hoffmann and Clyde suggested⁵⁶⁵ that the term ‘reasonable man’ should no longer be used in order to avoid confusing directions to the jury. Although these comments do not represent a majority decision, if followed, the test for provocation would become an extensive one. Wherever there is a sympathetic element to a case, then it will be better for the defendant to plead provocation, given the lower burden of

⁵⁶¹ Ibid., 718. In fact, it is likely that all such conditions would fall within the defence of diminished responsibility.

⁵⁶² Ibid., 674, 678, (Lord Hoffmann); 684 (Lord Clyde).

⁵⁶³ Ibid., 678.

⁵⁶⁴ Simester and Sullivan, *Criminal Law: Theory and Doctrine*, www.hartpub.co.uk/Updates.

⁵⁶⁵ [2000] 3 WLR 654, 678, 684.

proof. The only proviso to this is that there must be an incident of provocation. Where there is none, only diminished responsibility can be used.

J. C. Smith found it unlikely that, in drafting sections 2 and 3 of the Homicide Act 1957, the draftsman intended the same kind of mental abnormality to apply to both defences.⁵⁶⁶ He highlighted the distinctions between the defences: the one requiring a person suffering from an abnormality of mind; the other, a reasonable person; both defences having different burdens of proof which render consideration of both defences at trial an unenviable task.⁵⁶⁷

However, it is likely that the substantial overlap between the defences of diminished responsibility and provocation will remain. Perhaps the situation which Lord Diplock envisaged in *Camplin* has never been more accurate that “it is now possible for a defendant to set up a combined defence of provocation and diminished responsibility, the practical effect being that the jury may return a verdict of manslaughter if they take the view that the defendant suffered from an abnormality of mind and was provoked. In practice this may mean that a conviction of murder will be ruled out although the provocation was not such as would have moved a person of normal mentality to kill.”⁵⁶⁸

⁵⁶⁶ [2000] *Crim LR* 1004, 1007.

⁵⁶⁷ [2000] *Crim LR* 1004, 1007. It was also the view of Lord Goff in *Luc Thiet-Thuan* [1996] 2 All ER 1033, 1046, that a defendant who failed to establish a defence of diminished responsibility might employ the same evidence to succeed in a plea of provocation, on the basis that the latter defence sets a lower burden of proof.

⁵⁶⁸ [1978] AC 705, 726-727.

Given that psychiatric evidence is more readily admissible⁵⁶⁹ in cases of diminished responsibility, there is a benefit to be gained from running both of the defences together, as a jury will tend not to separate the evidence from issues concerning the provocation.⁵⁷⁰ There may be situations where a condition falling short of being a mental abnormality affects a person's capacity for self-control. The combination of defences are of particular use to women who have been abused as the defence of provocation requires them to show a sudden and temporary loss of self control in circumstances where there may have been a delay between the last act of provocation and the killing. The judge can order provocation to be used as a defence where diminished responsibility is raised, thus allowing the same evidence to be used. Where, however, the prosecution accepts a plea of diminished responsibility, then issues relating to provocation will not go before a jury, and may not be reflected in sentencing.⁵⁷¹ Mackay suggests⁵⁷² it is best to run both pleas if a defendant showed signs of mental abnormality at the time of the provocation.

While Lord Hobhouse viewed this as a poor state of affairs,⁵⁷³ it is possible that, where the inadequacies of the two defences prevent justice from being done in individual cases, their overlap may restore the balance. However, if this is to be the current position, there should be formal recognition of the fact. The two defences should be combined into one defence of emotional disturbance, requiring one burden of proof, that is capable of applying to the mentally normal and abnormal. While this

⁵⁶⁹ The Court of Appeal in *Turner* [1975] 1 QB 834 held that "jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life", 842. While psychiatric evidence may be admissible in provocation cases to explain the defendant's loss of self-control, it would not be admissible in explaining whether the ordinary person would have done the same: *Camplin* [1978] 2 All ER 168, 182-183.

⁵⁷⁰ Mackay, above n.445, 201.

⁵⁷¹ Mackay, above n.451, 64.

⁵⁷² Mackay, above n.445, 202.

⁵⁷³ [2000] 3 WLR 654, 696.

may not have been the intention of the Parliamentary draftsmen, our understanding of conditions which reduce responsibility has altered substantially in the past few decades. With recognition of the effect of such conditions as post-traumatic shock disorder, battered woman's syndrome and pre-menstrual tension on the 'ordinary' person, the division between who is normal and abnormal is much less clear. This recognition is demonstrated by recent Court of Appeal authorities and the majority decision in *Smith*. While the reasoning of the majority is less compelling than that of the minority, and has led to a "muddle"⁵⁷⁴ in the law of provocation, it reflects a need to develop one defence which can cater for our willingness to understand that many factors can reduce a person's responsibility for murder.

4. Reform Proposals

When the diminished responsibility defence was introduced, it was anticipated that there would continue to be more pleas for insanity. This has not turned out to be the case.⁵⁷⁵ The implication of this is that we are punishing, albeit at a reduced level of responsibility, a greater number of individuals who are suffering from mental conditions than we would be if the insanity defence provided an adequate alternative. This section will examine the following proposals for reform of the defence: the abolition of the mandatory life sentence for murder, and consequent abolition of the defence of diminished responsibility; the extension of a version of the defence to all offences; UK reform proposals; the introduction of a *mens rea* variant of the defence; the separation of provocation and diminished responsibility through the use of a

⁵⁷⁴ [2000] *Crim LR* 1004, 1009.

⁵⁷⁵ See above, *I*.

medicalised definition; and, the merging of the two defences to give one defence of emotional disturbance.

4.1 Abolition of the Mandatory Life Sentence

The Butler Report's first preference for reform was the abolition of the diminished responsibility plea and of the mandatory life sentence.⁵⁷⁶ While abolition of the mandatory life sentence may result in justice being achieved in terms of sentencing, it cannot be desirable for certain less blameworthy individuals to share the stigma of a murder conviction with serial killers and those deserving of being called murderers. The Criminal Law Revision Committee, in its Fourteenth Report,⁵⁷⁷ has rejected that murder and manslaughter be replaced by one offence, with gradations, and although the Committee was divided on the abolition of the mandatory life sentence it considered that partial excuses should be retained even if it were to be abolished.⁵⁷⁸

It is unlikely, therefore, that one offence of homicide, with varying degrees of blame, will be introduced in this country, especially given that: "Homicide covers such a wide moral range that pressure for the recognition of moral and legal subdivision is bound to occur."⁵⁷⁹ It is also unlikely that the mandatory life sentence, until opinion is less divided, will be abolished.⁵⁸⁰ In brief, the principal argument in favour of its abolition is that murder is not a homogenous offence and can range from brutal killing

⁵⁷⁶ Above n.472, paras. 19.14-16.

⁵⁷⁷ Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*, Cmnd. 7844 (1980), para. 84.

⁵⁷⁸ This opinion was also expressed by Lord Hoffmann in *Smith (Morgan)*, 666 and Lord Clyde, 681.

⁵⁷⁹ Wasik, "Partial Excuses", [1982] *MLR* 516, 530.

⁵⁸⁰ Above n.577, para. 76.

to ending an individual's suffering through mercy killing.⁵⁸¹ Sentencing should reflect this differing range of culpable behaviour.

Those opposed to the abolition of the mandatory life sentence argue that a penalty for this unique crime should carry the greatest deterrent effect. In addition, judges are unable to know when it will be no longer dangerous to release such an offender,⁵⁸² although, as the Butler Committee has recognised,⁵⁸³ this has been occurring with those offenders who have successfully employed a defence of diminished responsibility for many years.

As Dell points out,⁵⁸⁴ if the life sentence for murder were to become discretionary, the effect of a diminished responsibility defence would be reduced considerably.

However, this should not mean that the defence should be abolished, since it is not desirable to label less blameworthy individuals as murderers. The CLRC feared that removal of the defences of diminished responsibility and provocation might result in sympathetic juries acquitting an individual who acted while suffering from a mental abnormality, rather than labelling such an individual a murderer.⁵⁸⁵ However, there is no suggestion that juries employ this tactic in relation to other serious offences such as rape.⁵⁸⁶ The CLRC's second argument was that judges would not know from the jury's verdict whether to impose a harsh or lenient sentence. Both of these arguments give force to the view that the defence of diminished responsibility ought to be

⁵⁸¹ Dell, above n.509, 815.

⁵⁸² Ibid., 815.

⁵⁸³ Above n.472, para 19.11(c).

⁵⁸⁴ Dell, above n.509, 815.

⁵⁸⁵ Above n.577, para. 76.

⁵⁸⁶ Dell, above n.509, 816.

extended to all crimes,⁵⁸⁷ which neither the Butler Committee⁵⁸⁸ nor the CLRC⁵⁸⁹ considered necessary.

The abolition of mandatory hospitalisation where the defendant is found not guilty by reason of insanity to a murder charge may be preferable to abolition of the diminished responsibility defence. As was predicted by Mackay,⁵⁹⁰ the failure to do so has led to a murder charge rarely attracting a finding of insanity or unfitness to plead.⁵⁹¹ Since the House of Lords decision in *Antoine*,⁵⁹² defendants have been unable to avoid the mandatory disposal consequences of an unfitness to plead outcome to a murder charge by pleading diminished responsibility to the 'trial of facts.' Approving the Court of Appeal's decision that diminished responsibility was not available to a defendant on a 'trial of facts,' Lord Hutton found that it was only up to a jury to find the defendant did the act charged against him, so that he could be protected from a charge of murder. This decision will lead to unfair results.⁵⁹³ In this case, the defendant's co-accused was able to rely upon the defence of diminished responsibility, while the defendant was unfit to plead and therefore unable to do so.⁵⁹⁴

4.2 Application to all Offences

Morally, we are prone to blame some individuals less than others. Legally, the same occurs where there is diminished capacity.⁵⁹⁵ This argument calls for extension of the

⁵⁸⁷ Ibid., 817.

⁵⁸⁸ Above n.472, para 19.9.

⁵⁸⁹ Above n.577, para 98.

⁵⁹⁰ Mackay, *The Operation of the Criminal Procedure (Insanity) Act 1964: An Empirical Study of Unfitness to Plead and the Insanity Defence* (1991), 28.

⁵⁹¹ Mackay, above n.451, 57-58.

⁵⁹² [2000] 2 All ER 208; See Chapter 2 above at 2.3.1

⁵⁹³ Mackay, above n.451, 59.

⁵⁹⁴ Both had apparently killed the victim as a sacrifice to the devil.

⁵⁹⁵ Morse, above n.532, 250.

defence of diminished responsibility to all crimes. While it is recognised that the defence is of greater utility for the offence of murder which carries the mandatory life sentence, recognition of a reduced level of responsibility, especially for stigmatic crimes, ought to be given at trial by a jury. This would be preferable to placing reliance upon justice being done during the plea in mitigation after a finding of guilt has already been made. While justice can be reflected adequately in sentencing policy,⁵⁹⁶ there appears to be no justification for restricting a defence which is based on principles of desert and fairness exclusively to murder. It is at the stage of attributing responsibility for a crime that a reduction in such responsibility ought to be recognised.

However, Wasik believes “it is a mistake to regard the fixed penalty and the availability of partial excuses as causally dependent on each other...It is rather that both phenomena stem from a third consideration: the fact that murder is marked as a ‘crime standing out from all others.’”⁵⁹⁷

The principle that an individual is less culpable in circumstances where he is less able to act rationally or responsibly, which lies behind the defence of diminished responsibility must have equal application to all offences,⁵⁹⁸ and yet, in practice, both the Homicide Act and the Model Penal Code only allow the defence to apply to homicide. To extend the defence to all crimes, unlike the *mens rea* variant of the defence, might result in many offenders receiving lighter sentences, but no defendant need be freed unconditionally.⁵⁹⁹

⁵⁹⁶ Ibid., 267.

⁵⁹⁷ Wasik, above n.529, 521.

⁵⁹⁸ Morse, above n.535, 22.

⁵⁹⁹ Ibid., 24.

In Germany, the defence is available to all categories of crime and operates as a means of reduction of sentence rather than altering the offence itself.⁶⁰⁰ A “partial defect of mind” in Italy will also reduce the length of sentence.⁶⁰¹ In South Africa the same applies, plus the defence will sometimes alter the category of offence.⁶⁰² Horder recommends⁶⁰³ an intermediate “diminished responsibility” verdict to be available to all offences. A verdict in itself, it would allow the judge to make a range of orders along similar lines to the disposal consequences for the Special Verdict.

However, it appears that no Anglo-American jurisdiction has allowed the use of a diminished capacity defence to all crimes.⁶⁰⁴ Of note in Scottish law, though, is the case of *HM Advocate v Blake*⁶⁰⁵ in which the diminished responsibility plea operated to reduce a charge of attempted murder to one of ‘assault to severe injury’.⁶⁰⁶ This is unusual in that it has been held⁶⁰⁷ that diminished responsibility could not be used to a plea of culpable homicide.

It was the view of the Butler Committee that the defence would not be needed elsewhere given that it was considered only necessary where the offence carried a mandatory penalty and the court have a wide range of powers to deal with mentally

⁶⁰⁰ New German Criminal Code, paras. 21, 22 and 61; Wasik, above n.529, 522.

⁶⁰¹ Walker, “Butler v The CLRC and Others” [1981] *Crim LR* 596, 597.

⁶⁰² *Harris* 1965 (2) SA 340 (AD); Wasik, above n.529, 522.

⁶⁰³ Horder “Pleading Involuntary Lack of Capacity” [1993] *CLJ* 298, 316-317.

⁶⁰⁴ Morse, above n.532, 242. Morse is of the view that the mens rea variant of diminished capacity should be extended to all offences that have a lesser included offence: Morse, above n.535, 14.

⁶⁰⁵ 1996 SLT 661.

⁶⁰⁶ The Scottish version of the defence refers to a state of mind bordering on insanity: *HM Advocate v Savage* 1923 JC 49. Since the cases of *Rose* and *Seers*, this comparison is no longer relevant to the English defence.

⁶⁰⁷ *HM Advocate v Cunningham* 1963 JC 80.

disordered offenders who are convicted of offences other than murder.⁶⁰⁸ However, the extension of the defence of diminished responsibility to all offences need not mean the artificial reduction of offences to lesser charges. It could instead lead to a reduction in sentence⁶⁰⁹ or even a substituted verdict.⁶¹⁰ It would seem that such a far-reaching reform is unlikely.

4.3 UK Reform Proposals

The Butler Committee favoured retention of a version of the diminished responsibility defence⁶¹¹ where an individual's mental disorder "was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter."⁶¹²

Clause 56(1) of the Draft Criminal Code adopted the version suggested by the CLRC:⁶¹³

"Where a person kills... he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act, and if, in the opinion of the jury, the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter." This division between murder and manslaughter would be for the jury to decide. The most significant benefit of this definition would be to remove the ambiguous term 'mental responsibility'.⁶¹⁴

⁶⁰⁸ Above n.472, para. 19.9.

⁶⁰⁹ Walker, above n.601, 597.

⁶¹⁰ Horder, above n.603, 316.

⁶¹¹ The Butler Committee suggested that 'diminished responsibility' was no longer an appropriate terms and preferred the use of the phrase "persons suffering from mental disorder." Above n.472, para 19.18.

⁶¹² Ibid., para. 19.17

⁶¹³ Above n.577, para. 93.

⁶¹⁴ Dell, above n.509, 817.

Use of the phrase 'mental disorder' in place of 'abnormality of mind' would follow the definition in the Mental Health Act 1983⁶¹⁵ to mean "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind."⁶¹⁶ This is a much broader definition than that given in the current parenthesis as there would be no requirement that the disorder be caused by disease, other inherent causes or injury.⁶¹⁷ This may lead to the inclusion of some transient disorders of the mind to fall within the defence which would not previously have been identified as so falling.⁶¹⁸

It may be the s2 and the CLRC's recommendation for a new defence of diminished responsibility are not far enough apart to effect a true reform of the defence. The proposed defence requires a jury to decide whether a mental disorder is 'substantial enough reason' to reduce the offence to manslaughter, which, it is assumed, requires that the reason has an effect on culpability.⁶¹⁹ Yet, with neither version of the defence is a minimum amount of culpability set for the offence of murder nor a maximum degree of culpability which could be entertained for manslaughter.⁶²⁰

4.4 A Mens Rea Variant

There are two variants of the diminished responsibility defence in the United States of America: the *mens rea* variant and the partial-responsibility variant.⁶²¹ The *mens rea*

⁶¹⁵ In the new Mental Health Act the particular categories of mental disorder will not be defined, so that no clinical diagnosis will limit the way in which the compulsory powers may be used: *Reforming the Mental Health Act, Part I, the New Legal Framework*, Cm 5016I, paras. 3.4-3.5. This could broaden significantly the scope of the proposed diminished responsibility defence.

⁶¹⁶ Section 1(2).

⁶¹⁷ Griew, above n.495, 79.

⁶¹⁸ *Ibid.*, 80.

⁶¹⁹ Griew, above n.524, 21.

⁶²⁰ *Ibid.*, 21.

⁶²¹ Morse, above n.532, 240.

variant allows defendants the opportunity to 'defeat allegations of guilt',⁶²² while the partial-responsibility variant operates as an excuse.⁶²³

The *mens rea* variant of a diminished capacity defence allows a defendant who lacked capacity to form *mens rea* to demonstrate that he is not guilty due to a lack of *mens rea*.⁶²⁴ This will seldom occur since mental abnormality rarely results in a defendant being incapable of forming *mens rea*.⁶²⁵ It is not, strictly, a defence; it is an absence of proof. Although Morse, who favours this variant, argues that public safety will not be compromised by use of this variant,⁶²⁶ this cannot be true where a defendant secures an acquittal based on a lack of *mens rea* due to mental illness unless civil proceedings are available to ensure his treatment and detention until such time as he can be released without posing any risk to the community.⁶²⁷ For policy reasons, the *mens rea* variant has been either rejected by some States, which have mistakenly assumed it was a partial responsibility variant and should be introduced through State legislature, or limited to murder or specific intent offences.⁶²⁸ While in principle any individual lacking *mens rea* should be acquitted, in practice policy decisions are necessary to prevent dangerous individuals from remaining a threat to the community.⁶²⁹

Given that in English law, where an individual lacks *mens rea* due to, for example, sleepwalking, the courts will construe this as insanity leading to the Special Verdict, the *mens rea* variant of diminished responsibility does not appear to have a role to

⁶²² Ibid., 243.

⁶²³ Ibid., 247.

⁶²⁴ This the 'dominant approach' in the United States. Morse, above n.535, 1.

⁶²⁵ Morse, above n.532, 244.

⁶²⁶ Ibid., 246.

⁶²⁷ This is a possibility recognised by Morse: above n.535, 17.

⁶²⁸ Mackay, above n.451, 67.

⁶²⁹ Ibid., 67.

play in this country.⁶³⁰ Where an individual satisfies the prerequisites for moral agency, he will be legally responsible for his acts. However, all legally sane individuals will not be equally rational at the time of committing an offence.⁶³¹ The partial responsibility variant, which operates in the UK, recognises that the individual seeking to rely on a diminished capacity defence was less responsible at the time of acting due to his mental condition.⁶³²

4.5 A Medicalised Definition

A medicalised definition of diminished responsibility, giving a clearer definition of 'abnormality of mind' and the four aetiologies, would assist in separating the defence from provocation. However, the same result could have been achieved through the minority judgment in *Smith*. A medicalised term would take the decision making further from the jury into the hands of medical experts. This is not advisable given that juries may legitimately differ to medical experts in finding a defendant blameworthy.⁶³³ When Dell carried out research into the increase in prison sentences⁶³⁴ for those who had successfully used the defence of diminished responsibility, she discovered that the reason for this was largely attributable to judges following medical advice in almost all cases. It was speculated that recommendations by doctors were made due to overcrowding in Special Hospitals.⁶³⁵ However, doctors did vary on the use of the four aetiologies, sometimes omitting reference to a cause of the abnormality.⁶³⁶ Such an arbitrary approach is to be avoided at all costs.

⁶³⁰ Ibid., 67-68.

⁶³¹ Morse, above n.535, 21.

⁶³² Ibid., 5.

⁶³³ As was stated in *Byrne* [1960] 3 All ER 1, 5. See above, 1.

⁶³⁴ Dell, above n.482, 14. The increase in prison sentences rose from two thirds of all cases being made hospital orders in the 1960's to the reverse by the end of the 1970's: *ibid.*, 3.

⁶³⁵ Ibid., 14.

⁶³⁶ Ibid., 39.

In order to alleviate the situation of medical experts pronouncing on the availability of the defence, they ought to be prevented from giving a diagnosis. Rather, they should be encouraged to describe the defendant's mental state at the time of the offence as completely as possible. This will avoid distracting the jury from the central issue, avoid confusion and prejudice arising from medical terms and keep battles between expert witnesses out of the court.⁶³⁷

4.6 A Demedicalised Definition

A demedicalised version of the defence may reduce the dependence on medical experts and increase the role of the jury. The Northern Territory of Australia has deleted the four aetiologies.⁶³⁸ While there had been a suggestion at the Committee stage of the Homicide Bill in the House of Commons that the four aetiologies be replaced by the phrase 'however arising', this was rejected on the grounds that it would not exclude outbursts of rage and jealousy.⁶³⁹ Parliamentary critics sought to show that the four aetiologies were unnecessary because normal reactions of jealousy and bad temper would not qualify as an abnormality of mind in any event.⁶⁴⁰ Mackay suggests that the 'simple way' to improve on the defence might be to follow the example of the Northern Territory of Australia.⁶⁴¹

Further, deletion of the term 'abnormality of mind' as well as the four aetiologies would force medical experts to rely on descriptions of the defendant's state of mind

⁶³⁷ Morse, above n.535, 51-53.

⁶³⁸ Criminal Code of the Northern Territory, s37.

⁶³⁹ Walker, *Crime and Insanity in England*, vol. 1 (1968), 151.

⁶⁴⁰ Griew, above n.495, 78.

⁶⁴¹ Mackay, above n.451, 65.

rather than seeking to fit mental conditions into the definition of the defence.

The State of Queensland has replaced the term 'mental responsibility' for 'his capacity to understand what he is doing, or his capacity to know that he ought not to do the act or make the omission...'⁶⁴² The danger, here, is that the defence may be so specific as to exclude, for example, the mercy killer, who will not satisfy this narrow definition.⁶⁴³

4.6.1. Combining Provocation and Diminished Responsibility

The combining, at trial, of the pleas of diminished responsibility and provocation may enable jurors to be more lenient towards deserving defendants. The decisions surrounding the objective test may be said to have done the same already.⁶⁴⁴ While Lord Goff in *Luc Thiet-Thuan* and the dissenting minority in *Smith* are opposed to the combining of these defences, the majority in *Smith* and the Court of Appeal on several occasions⁶⁴⁵ have recognised that this occurs. Mackay argues that the two defences are "slowly collapsing or merging into one another" and that now may be the time to "accept this coalescence fully in favour of a 'partial responsibility' plea, which encompasses both".⁶⁴⁶

The United States Model Penal Code sets out a defence to murder of 'extreme mental or emotional disturbance'⁶⁴⁷ which appears to combine the defences of provocation

⁶⁴² Queensland Criminal Code, s304A (introduced in 1961).

⁶⁴³ Mackay, above n.451, 65.

⁶⁴⁴ Ibid., 75.

⁶⁴⁵ See, e.g., the statement of Beldam LJ in *Thornton* [1992] 1 All ER 306, 315: "There is no doubt that the two defences are not incompatible where the evidence which is given enables them to be combined."

⁶⁴⁶ Mackay, above n.451, 77.

⁶⁴⁷ S210.3(1)(b).

and diminished responsibility.⁶⁴⁸ Most of the States which have adopted the definition have omitted the word 'mental', thereby restricting the scope of this defence.⁶⁴⁹ One combined defence would standardise the burden of proof, allow for combined use of evidence and reduce confusion among jurors, who would be able to return a verdict of manslaughter in deserving cases.

5. Recommendations

Although any new proposal may have the effect of narrowing the scope of the diminished responsibility defence, given that its obscure wording has enabled it to be applied widely,⁶⁵⁰ a new defence, which is capable of consistent application, is necessary in the interests of justice.⁶⁵¹

There will be times where an individual, who satisfies the minimum criteria to be a moral agent, commits an offence under circumstances where we are prepared to recognise a reduced level of responsibility. It may be preferable to regard the partial defence of diminished responsibility not as an aberration of the traditional model of excuses but as a form of excuse which falls further down the scale from those which allow complete exemption from responsibility.⁶⁵² It follows that there is no just reason why a diminished responsibility defence should not be extended to all other offences.⁶⁵³ However, such a proposal is unlikely to be introduced in English law.

⁶⁴⁸ Mackay, above n.451, 68.

⁶⁴⁹ Ibid., 68.

⁶⁵⁰ Griew, above n.495, 87.

⁶⁵¹ Mackay, above n.451, 79.

⁶⁵² Wasik, above n.529, 524-525.

⁶⁵³ Mackay, above n.445, 206.

Even if the mandatory life sentence for murder were to be abolished, a diminished responsibility defence should exist in order to distinguish between degrees of culpability in homicide. Also, it must be assumed that the diminished responsibility defence will continue to be required independently of any reforms which are carried out in relation to the insanity defence, as there will still be occasions where a defendant may be denied an insanity defence in relation to a murder charge, having acted in a state of mental disturbance.⁶⁵⁴

The major difficulty lies in determining what mental conditions should fall within the defence. Williams saw that the defence had 'worked both badly and well' and proposed that the term mental abnormality be removed from the defence, allowing a jury to reduce a murder conviction where culpability is diminished.⁶⁵⁵ Rather than a full overhaul of the diminished responsibility defence, Mackay proposes⁶⁵⁶ deletion of the term abnormality of mind and all of the words in parenthesis so that psychiatrists can concentrate on issues they understand.

Certainly, demedicalising the defence should return the decision making to the courts, limiting the role of experts to a descriptive one. Such a reform would remove some of the few remaining distinctions between the defences of diminished responsibility and provocation. This reality needs to be accepted and developed. The distinction between the individual suffering from an abnormality of mind and the reasonable individual sharing many characteristics of the defendant is no longer significant. Juries have been dealing with both defences side by side for some time. The complications they

⁶⁵⁴ Griew, above n.495, 75.

⁶⁵⁵ Williams, above n.463, 558.

⁶⁵⁶ Mackay, above n.445, 203.

face are of the strained definitions and varying burdens of proof. This situation could be eased by the introduction of one partial responsibility defence combining provocation and diminished responsibility. This could be achieved through the introduction of a defence of mental and emotional disturbance, similar to that of the Model Penal Code which provides that a person who intentionally kills shall be guilty of manslaughter where such killing is “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse should be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”⁶⁵⁷

Simester and Sullivan suggest that such a defence “would offer a more straightforward, less covert negotiation of the divide between murder and manslaughter.”⁶⁵⁸ The defence would represent a more accurate recognition of the overlap between provocation and diminished responsibility and would allow for a demedicalised defence which could be taken out of the remit of medical experts and placed directly into the hands of the jury.

6. Infanticide

Distinct from the defence of diminished responsibility, but recognising a similar reduction in culpability is the offence of infanticide which is a lesser charge to murder set out under s1(1) of the Infanticide Act 1938. This homicide offence allows the mother who kills her child below the age of 12 months, the balance of her mind being

⁶⁵⁷ § 210.3(i)(b).

⁶⁵⁸ Simester and Sullivan, above n. 489, 356.

disturbed by reason of her not having fully recovered from the birth or her still suffering the effects of lactation, to be treated as though she is guilty of manslaughter rather than murder. The offence can be described as “a more accommodating ground of mitigation than diminished responsibility”⁶⁵⁹ especially since it can avoid the distress of an initial charge of murder. There is also no requirement that the defendant be suffering from a clinical disorder.⁶⁶⁰

It appears there is no burden of proof on the defendant, merely an evidential burden, although most cases result from a guilty plea to the offence, and are accepted as such where there is evidence of emotional disturbance at the time of the offence.⁶⁶¹ It is worth noting that social and familial circumstances⁶⁶² surrounding the birth may cause in the defendant a disturbance of mind but, were the offence to be strictly enforced, would not satisfy its provisions and also that the second limb of the offence has been discredited.⁶⁶³

While the Butler Committee recommended the abolition of the offence in favour of the further reaching defence of diminished responsibility, the CLRC did not agree. The offence of infanticide avoids a charge of murder and the elements of the offence would be easier to satisfy than the defence of diminished responsibility.⁶⁶⁴

⁶⁵⁹ Ibid., 582.

⁶⁶⁰ Ibid., 582.

⁶⁶¹ Mackay, “The Consequences of Killing Very Young Children” [1993] *Crim LR* 21.

⁶⁶² Maier-Katkin and Ogle, “A Rationale for Infanticide Laws” [1993] *Crim LR* 903.

⁶⁶³ Bluglass, “Infanticide” [1978] *Bulletin of The Royal College of Psychiatrists*, 14. The Butler Committee considered that with most cases of infanticide the link between the effects of childbirth or lactation was remote, above n.472, paras 19.23-19.24.

⁶⁶⁴ J. C. Smith, above n.476, 386.

Thus, the suggestion of the Law Commission in its Draft Criminal Code is to be preferred: "A woman who, but for this section, would be guilty of murder or manslaughter of her child is not guilty of murder or manslaughter, but is guilty of infanticide, if her act is done when the child is under the age of twelve months and when the balance of her mind was disturbed by reason of the effect of giving birth or circumstances consequent upon that birth."⁶⁶⁵

Even so, this reformulated offence would not take into account the situation where a mother kills her older child as well, or where the child was over twelve months old.⁶⁶⁶

A defence of emotional disturbance, discussed above, would be able to take such factors into account.

⁶⁶⁵ Law Commission, No. 177, *A Criminal Code for England and Wales*, (1989), Cl.64(1).

⁶⁶⁶ Simester and Sullivan, above n.489, 583.

CONCLUSION

The criminal law is still prepared to punish many individuals who ought not to be held eligible for blame and punishment, either because of the involuntariness of their actions, their lack of moral agency, or due to a lack of rationality.

While the decisions in *Larsonneur* and *Winzar* remain good law, individuals may continue to be punished for being in an involuntary state of affairs. It is suggested that these decisions should be treated as mistakes, and no longer be followed. The preferable model to follow is evident from the decisions of the Supreme Court of Alabama in *Martin*,⁶⁶⁷ which found that voluntariness was required, in circumstances similar to *Winzar*, and in *O'Sullivan v Fisher*,⁶⁶⁸ the Australian case which allowed the same conclusion.

The choice theory of excuse regards as moral agents those individuals who have the capacity to understand what the law is, while the character theory requires that the individual has a deeper understanding of moral qualities in order to be regarded a moral agent. While the choice theory of excuse remains the preferred theory for the society in which we currently live, in the future the character theory of excuse may be perceived as the better option. The principal difficulty in adopting the character theory of excuse currently is to exclude those individuals from the criminal law, to whom we currently desire, above all others, to attribute liability - the dangerous severely personality disordered. It is apparent that the public are not ready to allow this to occur. It is possible, when a greater understanding of the personality disordered has

⁶⁶⁷ *Martin v State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

⁶⁶⁸ [1954] SASR 33.

been gained, better diversionary systems are in place for the protection of society, and attitudes have altered, that the DSPD individual would be described more accurately as being incapable of moral agency. Currently, when such individuals come before the courts there is an impetus to treat them as normal. However, if we become able to reliably identify them, predict their dangerousness and provide better treatments, it may be preferable to divert them and not subject them to trials. Such a time has not yet arrived.

Even on the choice theory of excuse, certain individuals who currently fall within our criminal justice system, should not be regarded as moral agents. The severely and permanently mentally ill, those who lack the capacity to choose, ought not to be held blameworthy. This ineligibility for blame ought to be conferred as a status. Although the unfitness to plead legislation recognises the position of such individuals, arguably, a status of exemption from criminal liability should arise prior to this point, through civil proceedings.

Where an individual is eligible to be considered a moral agent, but suffers a temporary lack of rationality, the defence of insanity reveals so many deficiencies that diminished responsibility is clearly the best resort on a charge of murder. Not only are the disposal consequences unacceptable on a charge of murder, and the social stigma compounded by the inclusion of, *inter alia*, diabetics and epileptics within the definition of 'disease of the mind', crucially the *M'Naghten* Rules do not address the issue of the defendant's lack of rationality. Many individuals who ought not to be regarded as rational choose to plead diminished responsibility, as a preferable alternative.

However, diminished responsibility grants only a partial reduction in criminal responsibility. While the defence often appears to provide justice in practical terms, it does not recognise the true nature of the defendant's defence, which may be attributable to emotional instability, overlapping with the defence of provocation, moving through the range of mental conditions to irrationality, where the more appropriate defence should be insanity. A better drafted insanity defence, carrying flexible disposal consequences on a charge of murder, would reduce the need for such pragmatic flexibility within the defence of diminished responsibility. The defence could be redrafted, then, and combined with the defence of provocation to allow consideration of those individuals who are emotionally destabilised, rather than irrational, and who ought to be entitled to a reduced form of criminal responsibility. Consideration of the extent of an individual's criminal responsibility ought to be the responsibility of the jury, based on medical evidence which is limited to a description of the defendant's mental condition.

Certain individuals ought not to be subjected to a criminal trial due to their status of ineligibility to be considered moral agents. This status applies to children below the age of ten and ought to apply to the severely and permanently mentally ill. Aside from these two categories, the most appropriate vehicles in criminal proceedings for consideration of a defendant's moral agency, based on his rationality, are the 'trial of facts' on examination of his unfitness to plead, or the insanity defence. It is hoped that when the inadequacies of the insanity defence are addressed, the need for inappropriate use of the defence of diminished responsibility will be reduced.

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